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PREROGATIVE RIGHTS AND PUBLIC LAW.[1]

"It is a strange desire which men have to seek power and lose liberty."—Bacon.

It is not singular that Mr. Whiting's pamphlet has achieved success. The opinions of a distinguished member of the profession upon a question closely connected with the liberties and fortunes of the loyal people of the country are entitled to be respectfully heard and considered. The attention due to eminence at the Bar is rarely refused when a popular dogma finds a cordial support in that quarter. The friends of the modern doctrines of high prerogative have cause to applaud this argument in its behalf; for they welcome in its pages that legal skill and learning which they have thus far sought in vain to enlist on their side. No one has presented their case so plausibly and with so much authority. Nor have the opponents of their theory anything to regret in this publication. It affords them a complete view of the merits of the position of their antagonists. They may at last be sure that they know its whole strength. There can be no doubt that Mr. Whiting has done full justice to his theme. In his pages they may make, as it were, a successful *reconnoisance*, by which they can fully estimate the possibilities and the dangers of the situation.

It is therefore plain that the loyal lovers of civil liberty and of the Federal Government should attend to the arguments set forth in this pamphlet. The theme is momentous. It involves the whole nature of the government of the Republic. The claim of authority made in behalf of the President and of Congress comprises the most imperial powers. The argument in its behalf is conducted with learning and skill. It concerns every citizen to know whether it is securely based, and erected according to sound principles of constitutional law and of civil liberty.

It is claimed for the government of the United States, that in conducting the hostilities now in progress for the suppression of the

[1] *The War Powers of the President and the Legislative Powers of Congress in relation to Rebellion, Treason, and Slavery.* By William Whiting.

rebellion, it may exercise full sovereign and belligerent rights against the rebels; that the familiar right of eminent domain embraces in its scope the authority to confiscate all the property, real and personal, situated within the insurgent district, together with the effects of the inhabitants of that district in the loyal territory; that this right may further be deduced in time of war from the clause of the constitution empowering Congress to provide for the general welfare and common defence, by which whatever powers are, in the judgment of Congress, or of the President as Commander-in-chief of the army and navy, necessary and proper for the destruction of the enemy, are granted; that the law of nations, established by modern usage, confers upon us, as belligerents, the universal right of confiscation and emancipation; and, finally, that there is no limit upon the power of Congress to provide the punishment of treason. These propositions, embracing the widest powers of unlimited sovereignty, demand the most serious attention. It is proposed to treat them in as much detail as the limits imposed on this article will permit.

The general doctrine, that the government may wield against the rebels sovereign and belligerent rights, admits of no serious doubt. It is equally clear that it is subject to some restrictions. It will not be claimed, for instance, that the government can accept the surrender of a military force, and then subject its members to indictment and trial for treason. It cannot take them as enemies and try them as traitors. And it may well be doubted whether the inhabitants of States whose governments have been usurped by traitors, can be liable criminally for acts done in obedience to the laws imposed upon them by the usurpers. *U. S.* v. *Hayward*, 2 Gallis. 485; *U. S.* v *Rice*, 4 Wheat. 242; Foster Crown Law, 399; 3 Inst. 7. Other limitations to this proposition may be discovered as its discussion becomes familiar to the courts. But the general doctrine is too well settled to be effectually denied.

The extent of the sovereign power of the government of the United States is defined and limited by the constitution. In dealing with its citizens it can do no act not embraced within the scope of the powers there granted, upon which certain broad restrictions have been placed, both by specific prohibitions, and by the general rule of interpretation, that the powers not expressly conferred are reserved to the States. In this manner the sovereign power of the United States is made up, defined and limited. These are familiar rules, but they have been much neglected in the discussion of this topic.

It is a fundamental principle of law that every man is presumed to be innocent until he has been proved guilty; and nothing is more carefully provided for in the constitution than the separation of the legislative and the judicial power. Therefore Congress, in the exercise of its power of legislation, cannot treat the inhabi-

tants of a certain part of the country as guilty of treason; for by its very nature it is incompetent to distinguish between the guilt and the innocence of any portion of its constituency. It can indeed learn that the laws of the United States are impeded by combinations of armed men; it can provide laws by which the courts may condemn the guilty; it can furnish means to the Executive for the enforcement of his authority; but it cannot apply the penalties which it creates, nor wield the force which it calls into the field against any class of citizens. These are the functions of the judicial and executive departments, and concern them only. Guided by these familiar landmarks, we can now approach the position of Mr. Whiting.

I. In treating of the sovereign powers of the government, he begins with the right of eminent domain, and claims that "the general government of the United States has in time of peace a legal right under the constitution to appropriate to public uses the private property of any subject or any number of subjects owing it allegiance;" that this right is not impaired by the existence of an armed rebellion against the government, which may on the other hand increase the occasion for its exercise; and that congress is the sole and conclusive judge of the necessity which justifies its use.

If these propositions are familiar to every lawyer, the application which is made of them is novel, and even surprising. The right of eminent domain has grown beyond all recognition. It is invoked to defend the seizure of all the real and personal property within half our empire. By its exercise "the condition of slavery" may be removed, and universal emancipation and confiscation will thus be accomplished by the lawful employment of an undisputed right of the government.

It may be safely asserted that so vast a scope was never before claimed for this doctrine. The warmest advocates of a strong government have not ventured to assume so burdensome a proposition. Since the right of eminent domain is inherent in the nature of government, this doctrine applies alike in peace and in war. The circumstances of the State may create the exigency, but they do not affect the right. If the existence of a rebellion may require the exercise of this right upon all the property within eleven States, why may not the emergencies of a commercial crisis or of a political necessity demand a similar proceeding? What may be done in Virginia to-day, may be practised in Massachusetts to-morrow; for "Congress are the sole and exclusive judges" of the occasion when the power is to be exercised.

If however we attend to certain familiar distinctions, this doctrine will be reduced within more modest limits. The thing itself must be taken, not the right of property in it alone. The legis-

lature may, for instance, take cows infected with pleuro-pneumonia, but it would not be competent for it to declare that such cows should be *res nullius*. Congress has no right to take property because it is not thought expedient that its owner should enjoy it. It must be taken to be *used* by the public, and not upon any vague ground that it would be better on the whole that it should be taken from its owner. *In jure non remota sed proxima causa spectatur.* There must be a specific purpose to which the property taken is to be applied. Nor is it competent for congress to legislate to take property from one class of citizens for the purpose of distributing it to a better class. The armed colonists and the emancipated negroes cannot in this manner become the owners of the rich lands of Florida or of South Carolina, however gratifying such a substitution might be to individuals connected with the government. *Wilkinson* v. *Leland*, 2 Pet. 627; *Varick* v. *Smith*, 5 Paige, 137. Upon this ground it has been expressly held in New York, that a statute empowering a municipal corporation to take more land for a street than was essential for its bed, was unconstitutional. *In re Albany Street*, 11 Wend. 149; *In re John and Cherry Streets*, 19 Wend. 659.

Nor does the wickedness of any class of men confer upon the government a broader right of eminent domain; for this right has nothing to do with the merits of the owner of the property taken, but falls alike on the just and the unjust. The sole question is this: Is the property taken for public use, and for a public use for which the government could constitutionally provide?

Mr. Whiting's answer to this question is plain and straightforward. "Every appropriation of property for *the benefit* of the United States, whether for a national public improvement, or to carry into effect any valid law of Congress for the maintenance, protection, or security of national interests, is a public use." If this is sound law, the difficulties of carrying on the government are infinitely relieved. The seizure of all the specie of the banks to pay the interest on the national debt would come within this definition. There is no protection for private property against so sweeping a power. If it is competent for Congress to seize all the property in the Southern States, because the task of suppressing the insurrection would therefore be lightened, the same reasoning might lead to a similar confiscation of Northern property, or of the property of such Northern persons as might be obnoxious to a majority in Congress, or who might be deemed by their political action to "embarrass" the administration in the conduct of the war.

The right of eminent domain can only be exercised by the provision of just compensation for the owner of the property; and unless such provision is made, an injunction will issue upon the application of any holder of property whose rights are menaced.

This rule imposes a condition which renders the application of this doctrine to the purpose desired wholly impracticable, unless some escape can be found from it. Mr. Whiting meets the difficulty by the suggestion that the owners of slaves and of other property to be taken for public uses, may not be found to be entitled to any compensation at all. He says, "The right to just compensation for private property so taken depends upon the circumstances under which it is taken, and the loyalty and other legal conditions of the claimant." No authority is cited for this statement, and it is not likely that any could be found to sustain it. The right to compensation is guaranteed by the constitution. The circumstances of the taking may tend to increase the claim of the owner, where unusual hardships have resulted from it; but they cannot in any way diminish his right to receive the full value of his property. It is even doubtful whether consequential advantages can be estimated in assessing his damages. See 2 *Kent Com.* 340, and cases cited in note.

Nor is the guilt or innocence, the loyalty or disloyalty of the owner material to the question of his right to be compensated. The law looks with indifference upon the personal merits of the citizen. The rights of property of the best and of the most worthless are equally sacred in its eyes. It would not bar a claim for damages for land taken under the power in question, if the owner had been convicted of all the crimes upon the statute book.

II. The right of eminent domain is not the only sovereign power of the Federal Government from which Mr. Whiting derives the right to confiscate and emancipate. He holds that the powers conferred upon Congress, by the general welfare clause of Art. I. sect. 8, are "more than imperial." "It was intended by the framers of the constitution . . . that the powers to provide for the *general welfare* and the *common defence* in time of war should be unlimited." The words "in time of war" in this sentence have been inserted since the first edition. So important a modification of opinion may encourage the hope that upon more mature reflection the whole clause may disappear.

It is indeed too late to discuss the significance to be given to the general welfare clause. Whatever speculative doubts may have been started concerning it by the opponents of the constitution, before its adoption by the States, they have long since been removed. Mr. George Mason's suggestion of an additional article to settle the construction to be given to it, was carried out by the adoption of the tenth Amendment, that all the powers not expressly granted were reserved to the States. It is more than fifty years since Mr. Whiting's theory has been abandoned by the constitutional lawyers of the country. In the present state of the doctrine of constitutional construction, it is difficult to understand that it should

have been seriously propounded. The weight of authority is overwhelmingly against it. "No stronger proof," says *The Federalist*, "could be given of the distress under which the writers labor for objections, than their stooping to such a misconstruction."—*Fed.* No. 41. It is condemned by Rawle and Sargent, and Kent and Story among the text writers, and by Jefferson, Madison, Monroe, and Hamilton, by the consent of all modern statesmen, and by the settled practice of the government. Mr. Whiting advances no argument and cites no authority for his construction, unless his reference to Mr. Jefferson's statement of the views of his political opponents be authority. But it would be scarcely safe to rely implicitly upon that source for a fair version of the principles of the Federal party. The burden is certainly upon those who adopt this doctrine, to support it; and until this is attempted, it would be superfluous to expose its inaccuracy.

It has been already remarked that in his second edition Mr. Whiting has qualified the sweeping effect which he gives to this clause of the constitution, by limiting it to the time of war. In the *errata* prefixed to this edition he makes the same qualification in five different places; and he has devoted two chapters to the "War Powers" of Congress and of the President. He deems that in time of war the legislature may pass any law which would be "apt" to aid the common defence; and that it may exercise "almost dictatorial powers;" that a similar *imperium* is vested in the President; and that the constitution does not prohibit him from capturing or arresting, by his "*picket guard or provost marshals*," any person aiding and comforting the enemy. And what that means can be learned on the 61st page of the pamphlet. "If the Commander-in-chief orders the army to seize the arms and ammunition of the enemy, to capture their persons, . . . to arrest within our lines, or wherever they can be seized, persons against whom there is reasonable evidence of their having aided or abetted the rebels, *or of intending to do so*, the pretention that in so doing he is violating the constitution is not only erroneous, but is *a plea in behalf of treason*. To set up the rules of civil administration as overriding and controlling the laws of war, *is to aid and abet the enemy*." To those who yield to Mr. Whiting's reasoning, it must seem a little hardy to criticise his positions.

Whence come these war powers? Where are they conferred? What is their limit, if there is any? These questions are not answered by Mr. Whiting; nor has any advocate of prerogative been more explicit than he. It is somewhat curious that so little reason should be given for so large a claim.

If we apply to the constitution the familiar rules of construction, we shall find nothing which can sustain the new dogma. It purports to create, define, and explain all the powers of Congress and

of the President; and by the rule of construction furnished by the tenth Amendment, it expressly confines them to the powers conferred. But no allusion is made to this distinction between peace powers and war powers. The event of war and of insurrection is foreseen and provided for, but it is not declared that any portion of the constitution is to be inoperative during the continuance of hostilities. Nay, more, one single right—the right to the writ of habeas corpus—was subjected to restriction in time of war; and a familiar rule of law renders the expression of this the exclusion of all other war powers. Had it been designed to suspend the right to trial by jury, the freedom of speech and of the press, and the other clauses of the constitution confirming the rights of the people, in time of war, we may safely conclude that so important a purpose would have been embodied in language admitting of no mistake. It was not the theory of the framers of the constitution to leave a power so grave and so vast to be deduced by implication.

III. We have already seen that Mr. Whiting derives from the "general welfare" clause the so-called war powers of Congress. He also enlarges the powers of the President by a similar deduction from equally slender premises. He says: "They are principally contained in the Constitution (Art. II. sect. 1, ch. 1)," which vests in the President executive power; "in ch. 7 of that article, which provides for his compensation; in sect. 2, ch. 1, which creates him Commander-in-chief of the army and navy, and of the militia when in actual service; in sect. 3, ch. 1, which requires him to give information to Congress of the state of the Union, and to recommend such measures as he may deem necessary and expedient; and 'by necessary implication,' in Art. I. sect. 9, ch. 2," which provides for the suspension of the writ of habeas corpus. "By Art. IV., sect. 2, the President is made Commander-in-chief of the army and navy of the United States, and of the militia when called into the service of the United States. This clause gives ample powers of war to the President when the army and navy are in 'actual service.' His military authority is supreme under the constitution while governing and regulating the land and naval forces, and treating captures on land and water, in accordance with such rules as Congress may have passed in pursuance of Art. I., sect. 8, chs. 11, 14. Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, by impeachment of the President: but for the military movements and measures essential to overcome the enemy—*for the general conduct of the war*—the President is responsible to and controlled by no other department of the government."

There is of course a certain sense in which this proposition is true. If by "military movements and measures essential to overcome the enemy, and the general conduct of the war," the movement of troops, and the plan and execution of a campaign are

intended, all reasonable men will gladly concede a doctrine so far removed from the theories practised upon at the last session of Congress. But Mr. Whiting means much more than this, by this language. Under the guise of an interrogatory, he sweeps within its scope "almost dictatorial powers." "Whether government is not entitled by military power to prevent the traitors and spies, by arrest and imprisonment, from doing the intended mischief, as well as to punish them after it is done; whether war can be carried on successfully, without the power to save the army and navy from being betrayed and destroyed, by depriving any citizen temporarily of the power of acting as an enemy *whenever there is reasonable cause to suspect him of being one?*" On the 60th page he says, "It would be more just to say that while war rages, the rights which in peace are sacred, must and do give way to the higher right, the *right of public safety.*"

Such doctrines sound strangely to American ears. The supreme "right of public safety," the necessity to avert public danger by restraining those who are suspected, are the main stays of tyranny, the deadly enemies of civil liberty. Wherever power has overridden the rights of the people, whether in the name of divine right, or of popular freedom, it has invoked the public safety, and has "deprived the citizen temporarily of the power of acting as an enemy" by imprisoning "*les suspects.*" The reign of Charles I., and the rule of Robespierre, Danton and Marat, are alike rich in precedents to guide a government which desires to enter upon that path.

The advocates of these doctrines do not rest them solely upon the power of Commander-in-chief conferred upon the President by the constitution; for he only commands the army and navy, and the militia in actual service; and *ex vi termini*, the militia not in service, and all others not included in the classes enumerated, are not subject to him as Commander-in-chief. It is this high military power, coupled with the doctrine of State necessity, upon which they rely. The great right of self-preservation, inherent in government, and implied in the formation of the Federal Union, includes in their judgment war powers, suspending the civil rights of the citizen, and subjecting him for the time to the honest discretion of the President and of Congress.

It is enough to say that history, and the theory of English liberty, brought to this continent by the Colonists, and adopted as the corner-stone of American Bills of Rights, unite to condemn this proposition. There is no such thing as State necessity known to our government. The English language has not been used in the defence of that doctrine for more than two hundred years. The last time it was invoked, it called forth the most memorable struggle in English history, and made wet the soil of England with the blood of civil war.

It is impossible in these pages to do justice to the historic parallel which the reign of Charles I. affords to the doctrines of high prerogative which Mr. Whiting and his school defend. It must here suffice to indicate the important points, and to refer the reader to the sources where the analogy can be more profoundly studied.

The accession of that unhappy monarch to the throne of England, forms the commencement of that memorable contest between power and constitutional liberty. He found the kingdom engaged in a war, in which the imbecility of James had involved the nation in disaster. Immediate and generous supplies were an imperious necessity. The great parliamentary leaders of that day, among whom Sir Edward Coke, Sir John Elliot, John Hampden, and Oliver St. John, have achieved a worthy fame among all lovers of free government, resolved to seize the favorable moment to wring from the King's necessities the firm establishment of those rights which have always been due to Englishmen. Unmoved by the entreaties of Charles, they refused to vote the money which was absolutely essential to the government to carry on the war, while they sturdily insisted upon a redress of the grievances of the people. The King was in despair; the emergency was pressing, and brooked no delay. It seemed to him that the honor and the safety of England were at stake. He yielded to the counsels of those around him, and sought the kingdom's salvation in the exercise of war powers.

The language of the court party in the defence of these powers is curiously parodied by the arguments which are employed by Mr. Whiting and his school. The forced levies of subsidies, and the arrests and imprisonments without lawful process, were justified on the ground of high State necessity. The advocates of the government rehearsed the greatness of the danger, and the need that the existence of the government should be preserved. "We are not now upon the *bene esse* of the kingdom, we are upon the very *esse* of it," said Sir John Rudyard, "whether we shall be a kingdom or no; *when we have made sure that England is ours, then we may have time to prune and dress it.*" And, anticipating by two centuries the language used upon recent occasions, he added, "Seems it a small thing unto you that we have beaten ourselves more than our enemies could have done? *And shall we continue to do so by our divisions, by our distractions?*"—2 *Parl. Hist.* 234.

At the conference between the houses concerning the liberty of the subject, holden April 17th, 1628, Mr. Sergeant Ashley on the part of the Lords held the following language: "The law martial likewise, though not to be exercised in times of peace, when recourse can be had to the King's Courts, yet in time of invasion or other times of hostility, when the army royal is in the field, and offences are committed which require speedy resolution and cannot

expect the solemnities of legal trials, then such imprisonment, execution or other justice done by the law martial is warrantable, for it is then the law of the land, and is *jus gentium.*"

Mr. Whiting is no whit behind his learned predecessor. "No citizen," he says, on p. 56, "whether loyal or rebel, is deprived of any right guaranteed to him in the Constitution by reason of his subjection to *martial law*, because *martial law* when in force is *constitutional law.*" Mr. Sergeant Ashley's zeal was not pleasing to the Lords, who disavowed him on the spot, nor yet to the Commons, who committed him to jail for the use of unconstitutional language before them.—2 *Parl. Hist.* 530.

It was fortunate for the liberties of England that the leaders of the Commons were not seduced by these arguments to abandon their protests against arbitrary power. The agitation proceeded until the King, weary of the struggle, gave his reluctant assent to the Petition of Right, "the second great charter of the liberties of England." (*Macaulay Essays, Am. Ed.* p. 156.) This memorable statute, which was brought by the colonists to this country as part of that inheritance of English freedom which the revolutionary war was commenced to maintain, establishes upon a sure basis the rights of the subject, and opposes an insurmountable barrier to the doctrine of prerogative and State necessity. After setting forth the "commissions directed to sundry commissioners in several counties," whereby subjects had been compelled to lend money, "and many of them upon their refusal to do so have *had an oath administered to them not warrantable by the laws or statutes of this realm;*" together with the illegal imprisonment, levies, and the enforcement of martial law within the realm, it proceeds as follows:

"They do therefore humbly pray your excellent majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence or tax or such like charge, without common consent by act of parliament; and *that none be called to make answer or take such oath*, or to give attendance or be confined or otherwise molested or disquieted concerning the same, or for refusal thereof; *and that no freeman in any such manner as is before mentioned be imprisoned or detained* . . . . that the aforesaid *commission for proceeding according to martial law be revoked:* and that hereafter no commission of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by color of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and the franchise of the land." *St.* 3 *Car. I. c.* 1.

But this statute was not long obeyed. The friends of arbitrary power were not content to abandon the contest. The interval between the second and third parliaments was distinguished by the exertion of high prerogative, and by the invention of a new stretch of power, consisting in the famous levy of ship money. In the

case of *Rex* v. *Hampden*, which was a suit to enforce this levy, the doctrine of State necessity was thoroughly argued and signally refuted.

The king had taken the opinion of the judges upon the following case: — "CAROLUS REX. When the good and safety of the kingdom in general is concerned and the whole kingdom is in danger: whether may not the king by his writ command all the subjects of this kingdom at their charge to provide and furnish such Number of Ships with Men, Victuals and Munition, and for such time as he shall think fit for the Defence and Safeguard of the kingdom from such Danger and Peril, and by law compel the doing thereof in case of Refusal and Refractoriness? And whether in such case is not the king the sole judge both of the danger and how the same may be avoided?"

All the judges were of opinion that the powers in question belonged to the king. The writs thereupon issued, and upon the refusal of John Hampden to pay the required tribute, a writ of *scire facias* was sued out. It was recited in the writ that the ship money was needed by reason of the irregular warfare waged by Turks, pirates, and others confederated together on the sea, and by reason of the danger of the kingdom in the then times of war, and for the defence of the realm. Mr. Hampden demurred, and on his demurrer the argument was had.

The case of the crown was put upon the law of nature, which made the good of the realm greater than the good of the subject; upon the law of necessity, by which in time of great public danger all things needful were permitted to the king as the head of the defence of the kingdom; and upon the ancient precedents. The defence did not deny that amid arms the laws were silent; but they urged that by necessity the law intended that great and sudden danger which confers the same right upon the subject as upon the sovereign. "*Tempus belli*," said St. John, "when property ceaseth is not upon every intestine or defensive war, but only at such times when the course of justice is stopped, and the courts of justice shut up." See also *Holborne's Speech*, 3 *State Trials*, 963.

It is needless to recite what followed; the decision of the judges, the protest of parliament, the impeachments, the civil war, and the death of Charles I. When the restoration brought back the Stuarts to the throne, they could not forget the claims of royal prerogative which had cost their house so dear. The struggle was again renewed, until the flight of James II. bore from England the defence of arbitrary power. The first year of William and Mary produced the Bill of Rights, in "An Act declaring the rights and liberties of the subject and settling the succession to the crown." It resolved:

1. That the pretended power of suspending laws or the execution of laws by royal authority, is illegal.

2. That the pretended power of dispensing with laws or the execution of laws by legal authority, as it hath been assumed and exercised of late, is illegal.

Since that statute the doctrines which drove England into the excesses of revolution, have never been defended on English soil; and it can only excite profound surprise that they have been revived in America, as the necessary and inherent rights of a republican government of limited powers.

The distinction taken in the remark of St. John cited above, contains the sound doctrine of the war power of the government. The law regards the necessities of warfare, at the time when and the place where the war is. Upon the field of battle or amid the camps, the military arm of the government must prevail; but when the courts are open, and men pursue their ordinary avocations, the rights of the citizen and the duties of the government remain unchanged. "I shall maintain '*Jus belli*,'" said Sir Edward Coke; "the time of peace is when the Courts of Westminster are open; for when they are open then you may have a commission of Oyer and Terminer, and when the common law can determine a thing the martial law ought not. . . When the courts are open martial law cannot be executed." Mr. Rolle, afterwards Lord Chief Justice, lays down the same doctrine. "If the Chancery and Courts of Westminster be shut up that are *Officina Justitiæ*, it is time of war; but if the courts be open it is otherwise; yet if war be in any part of the kingdom that the sheriff cannot execute the king's writ, there is tempus belli." "If an enemy come into any part where the common law cannot be executed, there may the martial law be executed." 2 *Rushw. App.* 76. In the *case of the Earl of Lancaster*, this point was expressly adjudged. He had been taken in open insurrection and by judgment of martial law was put to death. This was held unlawful because at that time the courts were open, and he was thus "*tempore pacis absque arraniamento, seu responsione seu legali judicio parium suorum &c., adjudicatus est morti;*" and such is also the doctrine of a manuscript report by Coke in the Nottingham MSS. where it is said, "*Nota, quod guerre dicitur in hoc regno esse quando exercitum justitiæ in curiis et placeis regis impeditur;*" to which Coke adds in a short note, ". . . *et ex hoc semble que ne fuit guerre inter E.* 3 *et H.* 6 *car exercitum justitiæ non impeditum fuit, come appiert per les reports de* 10 *E.* 3 *et* 49 *H.* 6 . . . *nec. temp. Car I.*" Hence it appears that there was not war between Edward III. and Henry VI., as is seen by 10 E. 3 and 49 H. 6, . . . nor in the time of Charles I. The importance of this statement will be felt when it is remembered that in the reign of Henry VI. the struggle between the houses of York and Lancaster began, and that he himself was driven from the throne by the victorious arms of Edward.

Such was the doctrine of the English law, and such the rights of

English freemen. The claim of the government to violate the rights of the subject in the name of State necessity and for the preservation of the kingdom was overthrown by the Petition of Right, and has never been revived since the reign of Charles I. In the presence of the enemy and amid the confusion of the camp and the battle field, the law martial may prevail; but where the courts are open and the sheriff can serve his process, there are *tempus pacis* and unimpaired civil rights. That these same privileges were brought to this country with the colonists has never been denied. The war of revolution was commenced to maintain the liberties belonging to the colonists as Englishmen. They were in no wise impaired by the success of our arms and by the achievement of our independence. The language of the constitution has left them untouched, and they still remain the rich inheritance of the American people.

IV. The length to which this discussion has been drawn forbids an elaborate examination of Mr. Whiting's construction of the clause of the constitution which provides that no attainder of treason shall work corruption of blood or forfeiture beyond the life of the person attainted. His position is briefly this: that this language imposes no limit upon the power of Congress to declare the punishment of treason, but that it was intended to prevent a sentence of death for treason under a statute of Congress from working, *ipso jure*, the consequence of an attainder at the English law. This theory is ingenious, but it is at variance with the contemporaneous exposition of the clause, and with the comments to more recent writers upon constitutional law. *The Federalist*, for instance, No. 43, discusses it as follows: "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it; but as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the convention have with great judgment opposed a barrier to this peculiar danger by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and *restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author*." Such seems to have been the construction put upon it by Congress in the St. 1790, c. 35, and Rawle, Sargent and Story concur in the same opinion.

V. We have hitherto considered the sovereign powers of the government of the United States, and the rights which are conferred upon it by the organic law, to deal with the persons and the property of its citizens. It now remains to inquire into the nature and extent of the belligerent rights which may be exercised against the organized forces of the insurgents in the field. Upon the banks of the Rappahannock, in North Carolina, on the shores of the Mississippi,

is *tempus belli*. A large portion of the territory of the Republic is occupied by the armies of the rebellion; throughout that region the courts are closed, and the power of the United States cannot be enforced. It is there the right and the duty of the government to govern by the law martial, until the restoration of the civil power releases it from that obligation. Upon the men in arms against the government, it is permitted to employ the usual machinery of war. Whatever would be lawful against a foreign enemy, is lawful against them, until they are driven from the field, and the authority of the Republic is again established throughout its entire empire.

The rights of war are defined by the law of nations. That code, guided by the spirit of Christian civilization, has established certain rules of warfare which bind the conscience of princes and the honor of states. No power can venture to disregard the restraint thus imposed upon hostilities. No enlightened ruler would seek to violate them. They constitute a portion of the morality of nations, whose obligation is universally conceded and obeyed so long as self-respect and national integrity remain. They are not derived from any considerations growing out of the dignity of the hostile power, but they spring from the moral sense, and the Christian culture of mankind. Their observance is a duty which a state owes to itself, as a member of the commonwealth of nations.

Hence it will be seen that these limits upon hostilities must control the government in dealing with the rebellion. "Those maxims of humanity, moderation and probity which we have before recommended," says Vattel, "are in civil wars to be observed on both sides. . . . Whenever a numerous party thinks it has a right to resist the sovereign, and finds itself able to declare that opinion sword in hand, the war is to be carried on between them in the same manner as between two different nations."—*Vattel, B. III.* c. 18. Such is believed to have been the modern practice. All governments in arms against their rebellious subjects have professed to acknowledge the binding force of this obligation. The rigors practised by Austria in the suppression of the Hungarian insurrection, were exertions of her despotic sovereign power against her subjects, and do not afford a precedent of public law upon which we can rely in the exercise of belligerent rights.

It would be needless to dwell upon this point, did not Mr. Whiting seem to deny it. "It is not conceded," he says, "that the government of the United States in a civil war for the suppression of rebellion among its own citizens, is subject to the same limitations as though the rebels were a foreign nation owing no allegiance to the country."—p. 47. For this "caveat" he cites no authority; it must therefore rest upon the weight to which his opinion is entitled, as compared with that of the writer above cited. If he is

right, we must lament that the code of nations has failed to place limits upon those contests whose peculiar bitterness seems most to need them; if he is wrong, it will be a source of regret to all judicious persons, and to none more so than to himself, that he should have given an undue encouragement to the kindling passions of this unhappy civil war.

The true rule is, then, that the government of the United States may do against the rebels whatever is lawful against a public enemy, and no more. It is needless, after the full discussions which have been had, to define at length the extent and limits of belligerent rights. It is sufficient to remind the learned reader that the confiscation of enemy's private property on land in time of war is condemned by the most respectable modern writers upon public law. And that the American government from its earliest existence has been the steady and earnest advocate of this doctrine.—*See authorities cited*, 24 *Law Rep.* p. 481.

VI. The pamphlet under consideration claims "that the law and usage of modern civilized nations authorizes the liberation of enemy's slaves as an act of war;" and from this proposition is deduced the right to address a proclamation to the slaves within the enemy's lines, declaring them free, and calling upon them for aid against their masters.

The question thus raised, it will be perceived, is limited to the right to liberate *enemy's* slaves. The right of a slaveholding nation to incorporate its own slaves into its military organization, depends upon its civil polity, and not upon the code of nations, subject to the obligation to employ them in such manner as that code allows. To this head the case of the negroes impressed by General Jackson may be referred. Nor is the question now under consideration whether slaves can be seized for the use of the invading army. There seems to be no valid distinction between this and any other species of property in this respect. Whatever an army needs it can levy from the surrounding country; but in all modern wars the duty of compensating the owners of the property taken has been recognized. *Halleck Int. Law.* 460, 461.

It is not easy to see why the property of the enemy in negroes is liable to be excepted from the rule which protects the private property of enemy's subjects. A proclamation of liberation is merely a license to the army to despoil them of this species of property. If applied to plate or to furniture, its illegality would instantly be felt by all. It is obvious to the simplest understanding that such a proclamation cannot affect the status of those slaves who do not come into the actual possession of the invading army, for capture alone can devest the masters' title, and to capture firm possession is an indispensable requirement.—*Wheat. Elements*, Pt. 4, c. 2, § 11; *Halleck*, p. 451.

It has been sought to relieve emancipation of this feature of illegality by the application of the doctrine of contraband of war. To a certain extent the analogy furnished by this doctrine is sound. Slaves taken in arms, or working upon enemy's fortifications, or used as spies or scouts, are plainly liable to capture; but the application made of this doctrine is universal. It is applied alike to the negro soldier, and to the slave peacefully tilling the soil a thousand miles from the seat of war. Mr. Whiting, in his preface, calls "slavery" a potent operative and efficient instrument for carrying on war; "an engine of war." Under this definition it is proposed to free all slaves whatever. But husbandmen in the field are not "military engines," nor are negro infants "potent instruments of war." The grain in a besieged fortress is part of the munitions of the place; but all the grain in the enemy's country does not, for that reason, become contraband.

But it is not alone for the sake of despoiling the enemy that a belligerent resorts to the expedient of proclaiming liberty to his slaves. Governments, like individuals, are presumed to intend the natural consequences of their acts, and the natural consequence of such a proclamation often is to cause the slaves to rise against their masters. And if we can judge at all from the great results which are promised by the advocates of this measure in the present civil war, it is in this, as it was in all the instances adduced by Mr. Whiting, designed to incite a servile insurrection.

The question of the legality of the measure of stirring up enemy's slaves to rise against their masters is not difficult to solve. It is only necessary to consider in what manner such an expedient operates, to decide it at once; and if we inquire of history there is but one answer. In San Domingo, and in South America, the instances relied upon by Mr. Whiting are full of the most savage horrors. The hostilities practised in those unhappy countries were not warfare, but indiscriminate massacre of every age, sex and condition. The blacks were no worse than the whites. Bolivar proclaimed the *guerra a muerte*, the war of death, in which neither party gave quarter. Boves perpetrated the most atrocious barbarities upon women and children. In San Domingo every house within the lines of the negro army was burned, and every white man, woman and child was slain, and both sides garnished their fortifications with rows of the heads of their victims. A government is held to answer before the tribunal of civilized nations for the hostilities carried on in its behalf, and it has no right to instigate blacks to cruelties which it cannot lawfully practice with its organized army. Such was the opinion of the founders of this government, when, in the Declaration of Independence, they complained of George III., that he had "incited domestic insurrection amongst us, and had endeavored to bring on the inhabitants of our frontiers the merciless

Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions."

It is claimed in the pamphlet before us that "England, France, Spain, and the South American Republics have actually freed the slaves of their enemies," and that their acts "conclusively show that the law and practice of modern civilized nations sanction that right;" p. 74. The precedents there adduced will scarcely bear out this assertion. The instances given cannot accurately be cited to show the practice of France and of Spain; and the government and the people of the United States have always repudiated in the strongest manner, and upon every occasion, the license which the English government permitted itself against this country.

It is conceded that English officers issued proclamations promising freedom to our slaves in the war of independence, and in the war of 1812. Lord Dunsmore, of Virginia, was the first to set this example; of whom Washington, writing to William Henry Lee, on December 26, 1775, said that he was influenced by "motives of resentment which actuate his conduct to a degree equal to the total destruction of the colony." His proclamation was answered by the Virginia Assembly by a series of resolutions, the preamble of which is as follows: "Whereas, the British Ministry have at length engaged in an open and avowed war with the good people of this colony, and in the prosecution thereof have manifested the most unrelenting fury, by burning and destroying open and defenceless towns contrary to the practice of war among civilized nations, by exciting domestic insurrections among our slaves, inviting the savages, and arming them against their masters."—*Am. Archiv.*, 4 *Ser.* vol. iv. p. 130. Mr. Bancroft tells us that the only effect of this proclamation was to rouse the people of Virginia to greater determination. Nor did this matter escape the attention of the House of Commons. In the debate on the address to the king in 1775, Governor Lyttleton intimated "that if a few regiments were sent to the southern colonies, the negroes would rise and imbrue their hands in the blood of their masters." To this suggestion Governor Johnstone replied as follows: "The other scheme he alluded to of calling forth the slaves is too black and horrid to be adopted." And it is worthy of remark that neither the King of England nor the parliament ever proclaimed universal emancipation of the slaves of the rebellious colonists. The grievance complained of in the Declaration of Independence was not forgotten by the revolutionary government, and at the end of the war they demanded and obtained from England an article granting indemnity for the slaves who had been seduced from their masters.

It will be fresh in the minds of all that a stipulation was inserted in the treaty of Ghent, by which the British agreed not to carry away the slaves who had taken refuge with them in accordance with

the proclamation of Admiral Cochrane, and that a controversy growing out of this agreement was submitted to the arbitration of the Emperor of Russia. John Quincy Adams, at that time Secretary of State, maintained, in behalf of this government, with great earnestness, that this proclamation was a flagrant violation of the rules of civilized warfare. It is sought, however, to destroy the authoritative force of the position taken by the United States in that controversy, by the assertion that Mr. Adams did not concur in the arguments which he then advanced. If this were the case, the private opinion of a statesman, however eminent, could hardly control the effect of a public declaration by this government upon a point of public law. But no evidence has been produced to show that Mr. Adams did not entertain the views which he presented with so much ingenuity and zeal upon that occasion. The language cited from Mr. Adams's speech, upon which reliance is placed, relates to a wholly different topic. He was discussing the right of search, and was narrating the willingness of the slaveholders who were associated with him in Mr. Monroe's cabinet, to concede it to a certain extent, in order to aid in the suppression of the slave trade. Of the position which they assumed upon that subject he said, "It was utterly against my judgment; but I was obliged to submit, and prepared the requisite despatches *to Mr. Rush*." The words italicised are omitted by Mr. Whiting, and of themselves are a refutation of the application which he makes of the quotation; for the principal argument upon the article of the treaty of Ghent was addressed to Mr. Middleton, then minister at the Court of St. Petersburg.

In truth the position taken by Mr. Adams in the despatches in question was not new with him at that time. The question as appears from his MSS., had arisen and was discussed at the conferences at Ghent. The thirteenth article of the original draft of the treaty submitted by the American commissioners provided that indemnity should be made for various wrongs done by the British to the property of American citizens; and among others, "for the enticing and carrying away of negroes contrary to the known and established rules and usages of warfare." The whole article was rejected by the British plenipotentiaries, not upon any ground connected with this topic, but because they were instructed neither to ask for nor to grant any indemnities whatever. Notwithstanding this refusal, a somewhat pointed discussion arose between the negotiators on the one side and the other, concerning the dealings of the English with American slaves. In the course of the negotiations the American commissioners took occasion to reproach Great Britain upon the subject, and to charge officers of her army with selling in the West Indies slaves enticed away from Virginia. This was denied on the part of the English, who demanded proof of these allegations. To this the American commissioners replied as follows:—

"The undersigned are now in possession of the proof alluded

to in their instructions from the Secretary of State. If to the promise that the officers who have been guilty of such transactions shall be properly punished, the British plenipotentiaries are authorized to add that restoration or indemnity shall be made to the owners of the property thus taken from them, the undersigned pledge themselves to produce that proof. But if the object of the British Government be only to inquire into and punish the treachery to the fugitive slaves, and not the debauching them from their duty, the undersigned are not aware by what authority they can be called on for the proof of facts, the discontinuance of which is by no means desirable to the United States, so long as the other part of their guilt, the seduction of their slaves, is not equally and explicitly denied. It is this enticement of slaves to desert and betray their masters under promises of employment in the naval or military service or of FREE settlement in His Majesty's colonies, which constitutes the outrage and violation of the laws of war among civilized nations of which the American Government complains, and for which they are instructed to claim from the British Government a promise in the treaty of peace to restore the property thus taken, or to indemnify the owner of it for loss. But after this offence against the United States and their citizens has been consummated, the British Government will perceive that to the American nation it must be immaterial whether those wretched victims of delusion are sold in the West Indies or cast forth to perish by disease or famine on the shores of their free settlements."

No one familiar with the transactions of the American commissioners at Ghent, or with Mr. Adams' diplomatic style, can doubt that these vigorous lines are from his pen.

In view of the facts of history and of the diplomatic declarations above cited, it is not easy to see how the government of the United States can invoke the precedent afforded by Great Britain to justify the emancipation of enemy's slaves. Whenever this right has been exercised against us by that power, we have interposed the most solemn protest, and the Declaration of Independence, the treaties of peace, and the archives of foreign powers bear witness to our refusal to recognize it among the legitimate acts of warfare. It is not permitted to a government to change its views of international law with every variation of national convenience. The controversy concerning the Trent may serve to remind us how odious a great power appears when deserting the principles which it has uniformly maintained.

It is also claimed that "France recognizes the right under martial law to emancipate the slaves of an enemy; having exercised and asserted that right in the case of San Domingo." Mr. Whiting says that in 1793 commotion had been raging in the island for nearly three years between the whites and mulattoes, in which the negroes had remained neutral; that the Spaniards had formed an

alliance with the revolted negroes, and that the English were preparing to invade the island; and that thereupon "Santhonax and Polverel, the French commissioners, issued a proclamation under martial law, wherein they declared all the slaves free; and from anarchy brought them over *en masse* to the support of the government."—p. 72.

This rapid summary of the events in San Domingo is widely different from the account given by historians and by eye-witnesses. At the time of the arrival of the French commissioners a vast servile war was in progress, which had baffled the power of the government for more than two years. The mulattoes sided with one or the other party, according to the prejudices prevailing in the different sections of the island. The commissioners, who were merely civil governors, and who had no power to administer martial law, were charged by the French convention to confer upon the free blacks equal rights with the whites. They were ardent republicans of the school of the Revolution, and they strove to carry out the will of the government. But the jealousies of race were too strong to be easily overcome, and they soon found themselves disliked by the whites as the agents of an odious reform, and despised by the mulattoes for their indecisive efforts to conciliate the contending factions.

The occasion of the proclamation of emancipation is attributed by the books of authority to causes quite other than those described in the pamphlet under consideration. When Gen. Galbaud, appointed to command the armies at San Domingo, arrived at the island, he found the authority of the commissioners but little respected, and the insurrection of the slaves ravaging the greater part of the colony. A conflict soon grew up between Santhonax and Polverel, and himself, which resulted in an open breach; and he, with his staff, was ordered on board of the vessels lying in the harbor. He thereupon seized the fleet, and landing with a force composed of whites who had been similarly imprisoned by the commissioners, and of others, took the arsenal with all its stores. A struggle ensued. The commissioners, worsted in the encounter, opened the prisons, armed the slaves, and called in to their aid a band of insurgent negroes who were ravaging the surrounding country. By the assistance of these forces, Galbaud was driven from the city, which was immediately burned by its defenders.

But the position of the commissioners was worse than ever. Surrounded by savage bands which they could not control, irrevocably embroiled with the whites by their alliance with the insurgent slaves, they in vain sought by promises of freedom to win to their side the great army of blacks which so long had defied their power. At length learning that Jean Francois, the negro commander-in-chief, was about to issue a proclamation calling upon all the slaves upon the island to rise against their masters, Santhonax resolved to have recourse to the expedient of emancipation for the purpose of saving

the lives of the remaining whites; who, overcome with terror, themselves signed the proclamation. Colonel Malenfant, who narrates these circumstances, was the only white who refused to sign it. "Cette circomstance," he says, speaking of the impending danger of insurrection, "l'obligeait, pour éviter les malheurs qui etaient arrivés dans la Plaine, à engages les proprietaires à concourir éux mêmes à une mesure qui seule pouvuit les sauver et empêcher la révolte." —*Malenfant, Colonies de St. Domingue. De Lacroix, Revolution de St. Domingue.*

It is therefore far from accurate to say with Mr. Whiting that this proclamation is an instance of arming enemy's slaves, under the authority of martial law. In point of fact the negroes wrested their freedom from the commissioners by force. It was wholly unauthorized by the French government, and it was not until several months afterwards that the abolition of slavery in the colonies was voted by the convention. Upon that occasion the negro deputies from St. Domingo were kissed by each member of that body, after which Danton delivered an animated discourse, in which he predicted the destruction of the English as the certain consequence of the emancipation of the slave.—*Cochin*, vol. i., p. 15.

It is conceived that it would be impossible to argue from these events that France had by her conduct afforded a precedent for the emancipation of enemy's slaves as a belligerent right. There is another instance furnished by that government which is more nearly in point. When war broke out with Russia in 1812, Napoleon found himself engaged in hostilities with half Europe, while the empire, exhausted by repeated conscriptions, had great difficulty in furnishing the necessary levies to fill the ranks of the army. Notwithstanding these arduous circumstances he refrained from calling the slaves of Russian masters to arms, although often urged to adopt this policy by the deputations from villages belonging to the enemy. In his address to the Senate, Dec. 20th, 1812, he himself stated the motives which determined this policy, as follows:—

"J'aurais pu armer la plus grande partie de la population contre elle même en proclamant la liberté des esclaves; un grand nombre de villages une l'ont demandé, mais lorsque j'ai reconnu l'abrutissement de cette classe nombreuse du peuple russe, je me suis refusé à cette mesure, qui aurait voué à la mort et aux plus horribles supplices bien des familles."—39 *Hist. Parl. de la Rev. Franc.* 393.

In like manner the allies in the late Crimean war refrained from emancipating the Russian slaves.

The length to which this paper has been drawn forbids a full analysis of the precedents adduced from the history of South America. It must here suffice to remark, that Bolivar was acting in behalf of no recognized government when he issued his proclamation of freedom to the slaves, and that Boves, who in behalf of the Spanish authorities had preceded him in the use of this expedient, was a

desperate partizan fighter, who acknowledged but nominal allegiance to his superior in the colony. Murillo never proclaimed emancipation at all. The hostilities carried on by the contending factions were stained with the most cruel atrocities. Wells were poisoned, prisoners were killed in cold blood, flags of truce were violated, non-combatants were slain without discrimination of age or sex. We can only lament and wonder when we are asked to find a precedent to guide the conduct of our arms in the warfare waged by the commander of the "*legion infernale*," and by the betrayer of Miranda.

In the light of the usages of war among civilized nations, the question of emancipating enemy's slaves stands thus. It was practised in South America by the chiefs of contending factions, but without the sanction of recognized governments. By a servile insurrection the slaves in San Domingo wrested from their masters a freedom *de facto*, which was afterwards granted to them by the decree of the French Convention. In both instances the hostilities were conducted in a manner long since reprobated by the public law and by the consent of civilized powers. The English government, in the War of our Revolution, and in 1812, sought to stir up the slaves and to seduce them from their masters, but in both instances the treaties of peace seem to recognize the illegality of this expedient by provision for partial or complete indemnity. The government of the United States has denied the right to interfere with enemy's slaves, by acts and declarations of the most solemn and public character; and finally, Napoleon in the Russian War refused to avail himself of this means of injuring the enemy, on the express ground of the nature of the warfare which would be its necessary result.

Before these pages reach the reader the fate of the President's proclamation of September 22d will have been decided. The policy which has been here discussed will have been either adopted or rejected so far as the will of the Executive can conclude a question so momentous. But the government of the United States is a government of laws, and not of men. The proclamation of the President, if illegal, is of no more lawful efficacy than were the writs of ship money or the English commissions of martial law. "It was resolved," says Coke, 12 R. 76, "by the two Chief Justices, Chief Baron, and Baron Altham, upon conference between the Lords of the Privy Council and them, that the King by his Proclamation cannot create any offence which was not any offence before, for then he may alter the law of the Land by his Proclamation in a high point. . . . . Also, the Law of England is divided into three parts, Common Law, Statute Law and Custom; but the King's Proclamation is none of them." It is not by disregarding precedent, but by the intelligent and faithful discussion of authorities that the sound doctrine and the true rule for our guidance may be discovered.

PETER *v.* COMPTON.

Trinity.—5 W. & M., King's Bench.

[REPORTED SKINNER, 353.]

"An agreement that is not to be performed within the space of one year from the making thereof" means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year.

THE question upon a trial before HOLT, Chief Justice, at nisi prius, in an action upon the case, upon an agreement, in which the defendant promised for one guinea to give the plaintiff so many at the day of his marriage, was, if such agreement ought to be in writing,[1] for the marriage did not happen within a year: the Chief advised with all the Judges, and by the great opinion (for there was diversity of opinion, and his own was *e contra*[2]), where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary; otherwise not.

This case turns on the fourth section of the Statute of Frauds. That section directs, among other things, that no action shall be brought, to charge any person, *upon any agreement that is not to be performed within the space of one year from the making thereof*, unless the agreement, or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. *Peter* v. *Compton* turned upon the meaning of the words printed in italics.

The opinion of the majority of the judges in this case has been often since confirmed. *Anon.* Salk. 280; *Francam* v. *Foster*, Skinner, 356; *Fenton* v. *Emblers*, 3 Burr, 1281; 1 Bl. 333, ubi, per DENISON J.: "The Statute of Frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed: it does not extend to cases where the thing *may* be performed within the year. In this case the defendant's testator had promised the plaintiff, that if she would become his housekeeper, he would pay her wages after the rate of £6 per annum, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his housekeeper, and continued so for more than three years. And the contract, though by parol, was held to be valid and not within the statute. Accord. *Wells* v. *Horton*, 4 Bing. 40, where it was held that a contract by A. that his executor should pay

[1] According to the exigency of the Statute of Frauds, 29 C. 2, c. 3, § 4.

[2] In Smith *v.* Westall, Lord Raym. 316, Lord HOLT says, speaking of this case, that the reason of his opinion was "because the design of the statute was not to trust the memory of witnesses beyond one year."

£10,000 need not be in writing: and *Souch* v. *Strawbridge*, 2 C. B. 808, where the contract was to maintain a child "so long as the defendant should think proper;" and *Smith* v. *Neale*, 2 C. B. N. S. 67, in which all that was to be done by the plaintiff, constituting the consideration for the defendant's promise, was capable of being performed in a year.

The statute does not extend to an agreement that one party may cut certain trees on the land of the other at any time within ten years. *Kent* v. *Kent*, 18 Pick. 569. A parol contract to support a person for a certain number of years, is not within the statute; for if he die within one year, having been supported under the contract until his death, the contract will have been fully performed. *Peters* v. *Westborough*, 19 Pick. 364. In an action by a surety on an administration bond against a cosurety for contribution, it appeared that the defendant signed the bond at the request of the plaintiff and upon the plaintiff's verbal promise to save him harmless. Held, that this promise might be performed within a year, and therefore was not required by the statute to be in writing. *Blake* v. *Cole*, 22 Pick. 97. An agreement to labor for a company, "for the term of five years, or so long as A. shall continue to be agent of the company," is not within the statute. *Roberts* v. *Rockbottom Co.* 7 Met. 46; nor an oral agreement, "not hereafter to engage in the staging or the livery-stable business in S." *Lyon* v. *King*, 11 Met. 411.

The words of the statute are, however, express; that no action shall lie upon any agreement that is not to be performed within one year after the making thereof, unless it be reduced to writing and signed. Accordingly, when the defendant's wife hired a carriage for five years at ninety guineas per annum, which contract was, by the custom of the trade, determinable at any time on payment of a year's hire, the court held the case within the statute, and that the contract ought to have been in writing. *Birch* v. *Earl of Liverpool*, 9 B. & C. 392. And so must a contract for a year's service, to commence at a day subsequent to the making of the contract. *Bracegirdle* v. *Heald*, 1 B. & A. 722; *Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20. So also must a contract for payment of an annuity, though it may determine within the year by the death of the annuitant. *Sweet* v. *Lee*, 4 Scott, N. R. 77; 3 Man. & Gr. 452, S. C.; or a contract for more than one year's service, though subject to the like contingency. *Giraud* v. *Richmond*, 2 C. B. 835; or though determinable within a year by notice. *Dobson* v. *Collis*, 1 H. & N. 81.

In *Boydell* v. *Drummond*, 11 East. 142, the plaintiff proposed to publish a magnificent edition of Shakespeare, illustrated by seventy-two engravings, which were to come out in numbers, at three guineas per number, two of which were to be paid in advance; each number was to contain four engravings; "*one number at least was to be published annually*, and the proprietors were confident that they should be able to produce two numbers *in the course of every year*." These proposals were printed in a *prospectus*, and lay in the plaintiff's shop. The plaintiff also kept a book, which had for its title, "*Shakespeare subscribers, their signatures:*" but did not refer to the *prospectus*. The defendant determining to become a subscriber to the work, signed his name in the book containing the list of subscribers, but afterwards refused to take it; though he had received and paid for some few numbers, this action was brought to compel him to complete his contract. The court decided that the agreement was not to be performed within the space of a year from the making thereof; that it was therefore within the statute. Lord

ELLENBOROUGH C. J.: "The whole scope of the understanding shows that it was not to be performed within a year; and if contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued that an inchoate performed within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is *performed*, which, ex vi termini, must mean the *complete* performance of or consummation of the work; and that is confirmed by another part of the statute, requiring only part performance of an agreement to supersede the necessity of reducing it to writing; which shows that when the legislature used the word *performed*, they meant a complete and not a partial performance." A case was put in the argument, of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract, was the payment of the price, which was not to be performed within the year, a question is made, whether by force of the statute the purchaser is exempted from the obligation of the agreement, as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. "In that case," said Lord ELLENBOROUGH, "the delivery of the goods which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of the consideration only would be reserved to a future period."

An oral agreement to employ an infant for five years, and to pay his father semi-annually for his services, is an agreement not to be performed within a year, within the statute, and no action lies thereon to recover one of the semi-annual instalments. *Hill* v. *Hooper*, 1 Gray, 131. See *Roberts* v. *Tucker*, 3 Exch. 632; *Drummond* v. *Burrell*, 13 Wend. 307. A parol agreement, between the parties to a lease for years in writing, entered into before the expiration of the lease, that the lessee would take the premises for another year, on the same terms, is within the statute. *Delano* v. *Montague*, 4 Cush. 42. A., on the sale to B. of a share in a patent right for a certain sum paid therefor by B., made an oral agreement with B. to repay him said sum, if he should not, within three years, realize said sum out of the profits arising from said share. Held, that this agreement was within the statute. *Lapham* v. *Whipple*, 8 Met. 59.

It was hinted in *Bracegirdle* v. *Heald*, 1 B. & A. 372, and decided in *Donellan* v. *Read*, 3 B. & Ad. 899, that an agreement is not within the statute, provided that all that is to be done by one of the parties is to be done within a year. There the defendant was tenant to the plaintiff, under a lease of twenty years, and in consideration that the plaintiff would lay out £50 in alterations, the defendant promised to pay an additional £5 a year *during the remainder* of the term. The alterations were completed within the year, and an action being brought for the increased rent, it was objected among other things, that the contract could not possibly be performed within a year, and therefore ought to have been in writing. The court, however, held that it was not within the statute. "We think," said LITTLEDALE J. delivering the judgment of the court, "that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for

in full till after the expiration of a longer time than a year: and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part. See *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 *Marsh.* 433; and see *Souch* v. *Strawbridge*, 2 C. B. 808, per TINDAL C. J.

It may be observed on this decision, that the contrary seems to have been taken for granted in *Peter* v. *Compton*, and others of the older cases; for instance, in *Peter* v. *Compton*, there would have been no occasion to argue the question, whether the possibility that the plaintiff's marriage might not happen for a year brought the case within the statute or no, if the payment of the guinea, which took place immediately, had been considered sufficient to exempt the agreement from its operation. It may be further observed, that the decision in *Donellan* v. *Read*, makes the word *agreement* bear two different meanings in the same section of the Statute of Frauds: the words of the 4th section are — "That no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of any lands, tenements, or hereditaments, or any interest in, or concerning them; or upon any *agreement* that is not to be performed within the space of one year from the making thereof; unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Now, it is clear, that the word *agreement*, when lastly used in the section, means what is to be done *on both sides*; and it was frequently (before the 19 & 20 Vict. c. 97, which abrogates the rule laid down in *Wain* v. *Walters*, 5 East. 10, and enables a party to give parol evidence of the consideration for a guarantee,) held upon that very ground, that guaranties were void if they did not contain the consideration as well as the promise. *Wain* v. *Walters*, 5 East, 10; *Jenkins* v. *Reynolds*, 3 B. & B. 14; *Saunders* v. *Wakefield*, 4 B. & A. 595; *Sykes* v. *Dixon*, 9 A. & E. 693; 1 Wms. Saund. 211, in notis; the notes to *Birkmyr* v. *Darnell*, 1 Smith's Lead. Cas. 262; and see *Shadwell* v. *Shadwell*, 30 L. J. C. P. 145; 9 C. B. N. S. 159; but a much more confined sense appears to be bestowed upon the word *agreement* when it is held, that an *agreement* is capable of being executed within a year, where one part only of it is capable of being so. In the case put by Mr. Justice LITTLEDALE, of goods delivered immediately, to be paid for after the expiration of a year, great hardship certainly would be inflicted on the vendor, if he were to be unpaid, because he could not show a written agreement. But it might be worthy of consideration, supposing *Donellan* v. *Read* could be considered a doubtful authority, whether, even if he were to be prevented from availing himself of the special contract under which he sold the goods, he might not still sue on a quantum meruit. See *Teal* v. *Auty*, 2 B. & B. 99; 4 Moore, 542; *Earl of Falmouth* v. *Thomas*, 1 C. & M. 109; *Knowles* v. *Mitchell*, 13 East. 249; as to an account stated, see *Cocking* v. *Ward*, 1 C. B. 858. In *Boydell* v. *Drummond*, 11 East. 159, it is expressly settled that *part performance* will not take an agreement out of the statute, and that upon principles which seem not inapplicable to the question in *Donellan* v. *Read*. "I cannot," said BAYLEY J.,

"say that a contract is *performed* when a great part of it remains unperformed within the year; in other words that *part performance* is *performance*. The mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it." See *Smith* v. *Westall*, Ld. Raym. 316. These observations seem applicable in full force to such a case as *Donellan* v. *Read*. The performance of one side of the agreement within the year could not be said to be more than part performance of the agreement; and the danger that witnesses may die, or their memories fail, seems to be pretty much the same in every case where an agreement is to be established, after the year is past, by *parol evidence*. Indeed if there be any difference at all in the danger of admitting oral testimony after the year, it seems greater in a case where one side of the agreement only has been performed, than in such a case as *Boydell* v. *Drummond*; since, where the agreement has been partially performed on both sides, as in the latter case, a witness giving a false or mistaken account of its terms, would have to render his tale consistent with what had been done by both the contractors; whereas, if the part-performance had been on one side only, the witness would only have to make his tale consistent with what had been done upon that side. It is true that, in *Donellan* v. *Read*, there was a part-performance on both sides; but so there was in *Boydell* v. *Drummond*: and the reason assigned for the decision in *Donellan* v. *Read*, viz. that the whole of one side of the agreement was performable within the year, would equally apply in a case where there had been, and could be, no part-performance on the other side for twenty years. It seems, however, too late to question the correctness of that decision. *Cherry* v. *Heming*, 4 Exch. 631.

The statute has no application to a contract which has been fully performed on both sides. The rights, duties and obligations of the parties resulting from such performance, stand unaffected by the statute. Thus, if an infant of the age of fourteen years enter into an agreement to labor until he shall come of age, in consideration of being furnished with his board, clothing and education, and the agreement is not so unreasonable as to raise any suspicion of fraud, and it is sanctioned by his guardian, and is fully performed on both sides, he cannot maintain a *quantum meruit* for his services, merely by showing, that in the event which has happened, his services were worth more than the stipulated compensation. *Stone* v. *Dennison*, 13 Pick. 1.

A contract within the provisions of the statute is one which neither party can enforce in a court of law. It cannot be used either as the basis of an action, or to defeat a claim otherwise just and reasonable. *Carrington* v. *Roots*, 2 M. & W. 248; *Reade* v. *Lamb*, 6 Exch. 130; *Comes* v. *Lamson*, 16 Conn. 246. Thus an oral agreement not to be performed within one year from the making thereof, cannot be set up in defence to an action on a *quantum meruit* for services performed under it. *King* v. *Welcome*, 5 Gray, 41. The cases in the Exchequer go farther than is necessary to sustain the rule above stated. They hold the contract, as a contract, is void, because it is a contract of which he cannot avail himself in a court of law. Upon this point the case of *Leroux* v. *Brown*, 12 C. B. 801, is in conflict with them. In the case of *Stone* v. *Dennison*, ubi supra, as we have seen, the court did not treat the contracts as absolutely void. When

fully executed they define and measure the rights of the parties thereto.

In cases falling within the 4th branch of the 4th section of the statute, it should seem that the performance of those terms which directly bring the case within the statute will not have the effect of taking the case out of the statute with regard to the other terms. See *Hodgson* v. *Johnson*, 28 L. J. Q. B. 88; E. B. & E. 685.

RECENT AMERICAN DECISION.

Supreme Judicial Court of Massachusetts.

January Term 1860.

LEWIS JONES *v.* COMMONWEALTH.

The keeper of a dog, though he be not the owner, is liable to the penalty imposed by the ninth section of St. 1859, c. 225. Gen. Sts. c. 88, § 56.

WRIT OF ERROR to reverse a judgment of a justice of the peace. The complaint charged "that Lewis Jones, of Wayland in the county of Middlesex, on the twenty-seventh day of August in the year of our Lord eighteen hundred and fifty-nine, at Wayland in the county of Middlesex, with force and arms, did keep a dog, which said dog was not then and there registered, numbered, described, and licensed according to the provisions of an act entitled 'An Act Concerning Dogs,' passed on the sixth day of April in the year of our Lord one thousand eight hundred and fifty-nine; against the peace of the said commonwealth and contrary to the form of the statute in such case made and provided."

The following errors were assigned:—1. That in the only count contained in said complaint, there is no allegation that the defendant, the present plaintiff in error, was the owner of the dog therein described and alleged to have been unlawfully kept. 2. Because said count is altogether uncertain and insufficient in law, and charges no offence with sufficient certainty. 3. And also that there is manifest error in this, that the record of the process and judgment is in other respects informal, erroneous and void.

METCALF J.—The first section of statute 1859, c. 225, requires every owner of a dog, on or before the 30th day of April, in each year, to cause it to be registered, numbered, described, and licensed,

in the office of the clerk of the town wherein he resides. By § 9, "whoever keeps a dog not registered, numbered, described, and licensed," as required by § 1, "shall forfeit the sum of ten dollars, to be recovered by complaint, to the use of the town wherein the dog is kept." The plaintiff in error, having been convicted on a complaint for keeping a dog not registered, &c. and having had judgment passed upon him for that offence, now seeks to reverse the judgment, for the reason that the complaint does not allege that he was the owner of the dog so kept. The position taken by him is, that as the owner only is required to cause the registering, &c. of a dog, the owner only is made liable to a penalty for keeping a dog not registered, &c. We do not so construe the statute. If it were meant by the legislature that the penalty should be imposed on the owner only, we cannot suppose that it would have been, in terms, imposed on the keeper, who may not be the owner. A distinction between the owner and the keeper is also found in § 7, which provides that when town officers have drawn an order on the town treasurer, as directed by § 6, to pay the owner of sheep or lambs for the worrying, maiming, or killing thereof by dogs, the town "may recover against the keeper or owner of any dog or dogs concerned in doing the damage, the full amount of the damage done, in an action of tort." And by § 14, any city or town is authorized to make by-laws relating to "dogs owned or kept in such city or town."

If the provision of the statute had been that whoever keeps a dog not collared, as directed by § 2, shall forfeit ten dollars, no one would suppose that the provision was intended to apply to the owner only. It may be thought that the provision would be more reasonable than that in § 9, which is now in question, inasmuch as a keeper of a dog must know whether it is or is not collared, but may not know, nor have the means of knowing, whether it is registered, numbered, and licensed, as the statute requires. This, however, is not for the consideration of the court.

Judgment affirmed.

F. F. Heard, for the plaintiff in error.

S. H. Phillips, (Attorney-General,) for the Commonwealth.

RECENT ENGLISH CASES.

Crown Cases Reserved.

REGINA *v.* GEORGE THOMPSON.—Nov. 15, 1862.

Larceny—Running away with money received for a special purpose in owner's presence.

A lady at a railway terminus, where there was a great crowd at the pay-place, seeing the prisoner within the barrier, and near that place, requested him to get her a ticket, which he consented to do. She then handed him a sovereign, but, instead of getting the ticket, he ran away with her money. It was found by the jury that he placed himself near the pay-place for the purpose of obtaining money as described.

Held, that as he took the money with intent to steal, and the lady never parted with her dominion over it, he was guilty of larceny at common law.

Case reserved at the Middlesex Sessions:—The prisoner was tried on the 6th of October, 1862, for stealing "one pound in money," the property of a man named Bates. From the evidence it appeared that on the morning of the 13th of September, an excursion train for York was about to start from the King's Cross terminus of the Great Northern Railway. There was a considerable crowd, and Mrs. Bates, the prosecutor's wife, being on the outside of the barrier, saw the prisoner near the pay-place, apparently about to take a ticket for himself. She asked him if he would get one for her for York. He said "yes." She then handed him a sovereign, the price of the ticket being only 10*s*. The prisoner received the sovereign, but, instead of applying for any ticket, stooped under the rail and ran across the platform. Mrs. Bates obtained the assistance of a constable, and in a few minutes they found the prisoner, who at first denied that he was the person, but afterwards offered Mrs. Bates a return ticket for Doncaster. She did not at the moment observe what it was, but said, "if you have taken my ticket where is my change?" upon which he handed her 2*s*. She told him she wanted 10*s*. as her change. He said he would go and get it; but she refused to allow him to go away, and gave him into custody. He had a sovereign in his hand when he was taken, and there were found upon him two return tickets for Doncaster. The prisoner's counsel submitted that there was no larceny, first, because there was no trespass, Mrs. Bates having voluntarily parted with the sovereign to the prisoner; and secondly, because it did not come within the meaning of the Bailee Act, as that Act only applied to cases where the same property was

to be returned, and not where different property was to be substituted for it. He cited *Reg.* v. *Garrett*, 2 F. & F. 14; and *Reg.* v. *Hassall*, 8 Cox C. C. 491; 9 W. R. 708. The counsel for the prosecution, contrà, referred to *Reg.* v. *Wells*, 1 F. & F. 109, as somewhat analogous in principle.

The prisoner's counsel having addressed the jury, the deputy assistant judge who tried the case told them in summing up, that if they thought, from the prisoner's conduct, that he did not place himself where Mrs. Bates found him, with the bonâ fide intention of taking a ticket for himself, and that at the time he received the sovereign from her he intended to steal it; and also that she did not intend to part with the property except for the purpose of obtaining her ticket and 10*s.* in change, then he thought they were at liberty to find the prisoner guilty.

The jury found the prisoner guilty, and said that, in their opinion, he placed himself near the pay-place for the purpose of obtaining money in the manner described.

The questions reserved were:—1st. Whether the verdict of guilty is, under the circumstances, sustainable by the general law as to larceny? and if not, 2ndly, Whether it is or is not sustainable under the particular provisions of the 24 & 25 Vict. c. 96, s. 3, relating to larceny by bailees? Upon the first point, *Reg.* v. *Brown*, 2 Jur. N. S. 192, may be referred to. The prisoner remains in custody, awaiting the judgment of the Court.

Ribton, for the prisoner. In all cases of larceny there is a trespass; but here the possession was voluntarily parted with by the owner. It was a breach of trust, but not larceny. In *Semple's case*, 1 Leach, 420, the chaise was obtained by a trick. *Reg.* v. *Atkinson*, 1 Leach, 302. [WIGHTMAN J.—"If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them make away with them, and convert them to his own use, he will be guilty of larceny." Arch. Cr. Pl. 14th ed. 290.]

The other point was not argued.

Cooper, contrà, was not called on.

POLLOCK C. B.—We are all agreed that the prisoner was guilty of larceny at common law. My brother Wightman has referred to a passage in a text book which applies to this case. The prisoner took the money with intent to steal it. The lady never intended to part with her dominion over it at all; but merely used his hand as her own.

The rest of the Court concurred.

Conviction affirmed.

REGINA *v.* HAMILTON THOMPSON.—NOV. 15, 1862.

Evidence of false pretences, but not larceny.

It was the duty of the defendant, a clerk, to pay dock dues upon goods exported by his master, and upon ascertaining the amount required upon each day's export, before paying it, to obtain it from his master's cash-keeper. Knowing that £1. 3s. only was due on one of those days, he fraudulently represented to the cash-keeper that a larger sum was due, and having obtained that and paid the £1. 3s. appropriated the difference.

Held, that although the evidence would have been sufficient to support an indictment for false pretences, he was not guilty of larceny.

Case reserved by the Recorder of Liverpool:—"At the Court of Quarter Sessions of the Peace holden in and for the borough of Liverpool, on the 4th day of September, 1862, Hamilton Thompson was tried before me upon an indictment containing three counts charging him that he, being the servant of one Edward Evans and others, did feloniously steal three separate sums of money their property. The prosecutors were wholesale druggists carrying on business at Liverpool, and were in the habit of exporting drugs to customers and consignees abroad. The prisoner was their clerk and servant. It was a portion of his duty to pay dock and town dues which might be due upon goods exported by the prosecutors. Upon ascertaining the amount required for that purpose upon each day's export, it was his duty before paying it to apply for and obtain it from the prosecutors' cash-keeper, and having obtained it, to pay it over. It was proved under the first count, that on the 21st of August, 1862, there was required to pay dock and town dues upon goods exported by the prosecutors, the sum of £1 3*s.* 0*d.*, and no more was paid by the prisoner on behalf of the prosecutors for such dock and town dues. It was also proved, that upon that day the prisoner, knowing that £1 3*s.* 0*d.* and no more was really due, fraudulently represented to the cash-keeper of the prosecutors that £3 10*s.* 4*d.* was really due from the prosecutors for such dock and town dues, and that he fraudulently obtained the sum of £3 10*s.* 4*d.*, from the said cash-keeper by such representation, intending at the time he so obtained it to appropriate the difference to his own use and defraud his master of the same, and it was proved that he did so appropriate such difference, being the sum of £2 7*s.* 4*d.* The second and third counts were supported by precisely similar proof. It was submitted by the counsel for the prisoner that the above evidence did not disclose a case of felony, and that if the prisoner had committed any offence in law it was that of obtaining money by false pretences, and in support of this view he cited *The Queen* v. *Joseph Barnes*,

reported 2 Den. C. C. 59; 20 L. J. M. C. 34. I was of opinion that the facts in *Reg.* v. *Barnes* were distinguishable from the facts in this case, inasmuch as there the money was delivered to the prisoner with the intent of parting with it wholly to him in repayment of sums supposed to have been already disbursed by him on account of his employers, while here it was delivered to him to be disbursed in future on account of his employers, so that the property in the money was not parted with by the prosecutors, but the possession only, and I thought that the prisoner might be found guilty of felony. The jury found the prisoner guilty, and I respited judgment and remanded the prisoner back to the Liverpool Borough Jail, reserving the question whether the prisoner on the foregoing state of facts was properly found guilty of felony."

Littler, for the prisoner, referred to *Reg.* v. *Barnes*, and was stopped. [WILLIAMS J.—The difficulty is to lay one's finger upon any particular coin stolen by the prisoner, because he was paid in the lump, and was justly entitled to a part of what he received.

Leofric Temple, contrà:—The offence was not "false pretences," for the money was obtained by a pretence that the prisoner would disburse the same on account of the prosecutor—that is, by a promise to do something *in futuro*. [POLLOCK C. B.—No doubt there was a misrepresentation of something to be done by and bye; but there was also a misrepresentation of an existing fact.] [WIGHTMAN J.—Then there is the question suggested by my brother Williams—how is the particular coin to be distinguished?] *Reg.* v. *Robins*, 1 Dears. C. C. 418.

POLLOCK C. B.—No doubt this was obtaining money by false pretences, but it is not larceny.

Conviction quashed.

REGINA *v.* MEANY.—Nov. 15, 1862.

Judge and jury—Refusing to record verdict.

A judge may, both in a civil and in a criminal court, refuse to receive and require the jury to reconsider their verdict; and where upon indictment for obtaining by false pretences, the jury found the prisoner guilty of obtaining the property by the false pretences alleged, but that they thought he meant to pay for it, and the judge refused to receive such verdict, and told them they must find the prisoner guilty or not guilty, and left the facts again for their consideration:—

It was *held* that a verdict of guilty which they then found was sustainable.

Case reserved at the Middlesex sessions:—"The prisoner was tried before me on the 8th of October, 1862, for obtaining by false pretences of one person a printed book of the value of 16*s.* 6*d.*, of another person 6*s.* in money, and of another person 10*s.* in money, and goods to the amount of £2. The false pretences

consisted of the production by the prisoner of two forged letters written on paper improperly obtained from the International Exhibition. The letters were alike in all respects except the date, and the particular amount of money, and were represented by the prisoner to be genuine. The earliest in date was as follows: The royal arms were in the margin, and the heading was printed "International Exhibition, 1862. Her Majesty's Commissioners, the Earl Granville, K. G., Chairman." The remainder was proved to be in the prisoner's handwriting: "Exhibition Building, South Kensington, W., August 11th, 1862. Sir,—I am directed by H. M. Commissioners to say that your account for £45 10*s.* (advertising in *Lancashire Free Press*) shall be laid before the Audit Committee at its next meeting on the 22d instant; and, should the amount be passed, a cheque shall be at this office for you at any time after twelve o'clock on Saturday, 23d. Meanwhile you are requested to send vouchers for the items charged as against Messrs. Kelk & Lucas.—I am, Sir, your obedient servant, J. H. Henderson, pro. J. J. Mayo.—S. J. Meany, Esq." The other letter was dated the 21st of August, and mentioned £42 10*s.* for advertisements in another paper. One of these letters was shown to each of the three prosecutors, and they all stated that they parted with their property on the faith of the prisoner's assurances that they were genuine. Mr. Mayo, the financial officer, and Mr. Street, of the advertising department, proved that the whole was a fiction, no such claims being in existence. The prisoner, who had no counsel, addressed the jury at considerable length, and contended that it was a simple debt on one side, and a simple credit on the other. He further stated that he intended to pay for the goods; but did not suggest any means by which he could do so. The facts having been left to the jury, after some consideration, the foreman said, "We find the prisoner guilty of obtaining the property by the false representations in the two forged letters, and that the parties would not have parted with it without those letters had been used; but we think that he meant to pay for them." I refused to receive this as a verdict, and told the jury that they must find the prisoner guilty or not guilty; and that if in their opinion he had not a fraudulent intention, they must say it by a verdict of not guilty. I put before them the leading facts of the case; and told them that in addition to the making of the false representations, and the obtaining of the goods by means of them, they should consider whether at the time he so obtained them he had a fraudulent mind. I then read to them the words of the statute, as follows—viz., "on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." I then specifically left it to them to say whether the

prisoner did the acts charged with an intent to defraud. After a short consultation they found a verdict of "guilty." Upon this, it was suggested to the prisoner that he should require the Court to enter the first statement of the jury, as a verdict of not guilty, instead of the second of guilty. I declined to accede to this suggestion, and was preparing to pass sentence, when one of the magistrates who sat with me stated that, in his opinion, the first finding ought to have been recorded as a verdict of not guilty. Under these circumstances I communicated with the Assistant-Judge, and it was deemed expedient to submit the matter to the judgment of the Court of Criminal appeal. The question for the determination of their lordships is whether the verdict of "guilty," pronounced under these circumstances is sustainable in law, or not? The prisoner is still in custody, but an order was made by the Court that he might be discharged, on entering into recognizances, himself in £80 and two sureties in £40 each, to come up for judgment at the December sessions.

JOSH. PAYNE, *Deputy Assistant Judge.*

Dickie, for the prisoner, urged that the first verdict amounted to not guilty, and ought to have been received by the judge; and that he was not at liberty to refuse receiving it.

Kemp, contrà, was not called on.

POLLOCK C. B.—The question is whether the judge may require the jury to reconsider their verdict, and that he may not do so is quite unarguable. I recollect that, when I was a young man, a person was tried for shooting the Hammersmith ghost. The jury, after retiring to consider their verdict, came back and found a verdict of manslaughter. Three of the judges from Westminster Hall were present and the recorder was in attendance, and each of the three judges addressed the jury, and told them that they were at liberty to find the prisoner guilty of murder, and that the offence was that if it was anything, and they found him guilty of murder. I think the man's name was Smith. He was told that he would not be executed; and he was pardoned. There is no doubt that a judge, both in a civil and criminal court, has a right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider their finding. The verdict which they ultimately find is the true verdict.

WILLIAMS J. added that he did not agree that the first verdict was an acquittal.

Conviction affirmed.

Regina v. Deer.

Receiving by adulterer.

Upon an indictment for receiving it appeared that the prisoner, who had lodged at the prosecutor's house for a year, one day left; but at what time, or in what manner, did not appear. On the following day the prosecutor's wife left with a small bundle. On the same evening the prosecutor missed certain articles of his property, which were of a bulk and weight too great to have been comprised in the bundle. Two days afterwards the prisoner and the wife were apprehended on board a ship bound for Quebec, for which place tickets in the name of Mr. and Mrs. D. were found upon his person. The whole of the missing property was found in his cabin and on his person.

Held, that there was sufficient evidence to go to the jury, and that their verdict of guilty must be sustained.

Case reserved at the last Midsummer Quarter Sessions for the county of Glamorgan.—Edmund Deer was tried upon an indictment the first count of which charged him with stealing certain articles, the property of William Bartlett. The second count charged him with receiving, knowing the same to have been stolen by some evil-disposed person. The prisoner had lived in the house of the prosecutor, William Bartlett, as a lodger, for about a year up to the 8th of April, 1862, on which day he left. There was no evidence as to the time or manner of his leaving. On the following day Sarah Bartlett, the prosecutor's wife, left her home. Her daughter, a girl of — years of age, accompanied her, and proved that her mother left with only a small bundle under her arm. Bartlett, on returning from his work on the same evening, missed the different articles enumerated in the indictment. On Thursday, 10th April, a policeman was sent to Liverpool, and on Friday, the 11th of April, he apprehended the prisoner in company with the prosecutor's wife, who was passing under the name of Mrs. Deer on board the *Culloden*, in the river Mersey, bound to Quebec, for which place tickets in the name of Mr. and Mrs. Deer were found on prisoner. The whole of the property missed was found in the prisoner's cabin and on his person, and was of a bulk and weight which could not have been comprised in the wife's bundle, and consisted of one purse and ten pounds of money, one pair of sheets, one pair of blankets, one feather pillow, two pieces of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster case, two knives, two forks, two spoons, three-and-a-half yards of black cloth, one piece of pilot cloth, one diaper table-cloth, one clothes brush, one razor, one pilot cloth-coat, one square, one hammer, two gimlets, one pair of compasses, one spokeshave, one gauge, one file, one chisel, and one bradawl. There was no further evidence who had taken the articles from Bartlett's house. The jury found him guilty of receiving

knowing the goods to have been stolen, and the prisoner was thereupon sentenced to be imprisoned and kept to hard labor for six calendar months, and is now in prison. After the jury had been discharged, upon the application of the counsel for the prisoner, this case was reserved, the question being whether such verdict could be sustained.

No counsel appeared on either side.

POLLOCK C. B. after briefly stating the facts, said the question is whether upon this evidence the defendant can be convicted. The evidence amounts to this — the property was gone and could not have been taken away by the wife, as her parcel could not have contained it, and the whole of it was shortly afterwards found in the prisoner's cabin and upon his person. We think that there was evidence from which the jury might draw the inference which they have drawn, and that the conviction must be sustained.

Conviction affirmed.

WHITE *v.* BASS.—Jan. 22, 1862.

Grantor and grantee of house — Obstruction of lights — Unity of possession — Severance.

A., being seised of an ancient house and adjoining land, leased the adjoining land to B., with covenant by B. not to build except as agreed by the lease, and afterwards granted the fee to B. Subsequently he granted the house to C.:— *Held*, that C. had no right to enjoy lights to the house from the adjoining land in the hands of B.

See *Story* v. *Odin*, 12 Mass. 157 (1815).

The declaration stated that, before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage, dwelling-house, and beer-shop, with the appurtenances, in which, during all the time aforesaid, there were, and still of right ought to be, divers ancient windows, through which the light and air during all the time aforesaid ought to have entered, and until the committing of the said grievances did enter, and still of right ought to enter into the said messuage, dwelling-house, and beer-shop, for the convenient and wholesome use, occupation, and enjoyment thereof; yet the defendant wrongfully and injuriously erected and raised, and caused and procured to be erected and raised, a certain wall and building near to the said windows, and wrongfully and injuriously kept and continued the said wall and building so there erected and made for a long time, to wit, from thence hitherto; by

means of which premises the said messuage, &c., during all the time aforesaid, was and still is greatly darkened, and the light and air were and are hindered from coming and entering into and through the said windows into the said messuage, dwelling-house, and beer-shop. Allegation of special damage. Claim of 500*l*. Pleas—first, not guilty; secondly, traverse of the averment that there were, at the time of the committing of the grievances, &c., ancient windows in the plaintiff's house through which the light ought to have entered. Issue on the pleas. Afterwards a special case was stated for the opinion of this court under an order made by CHANNELL B. The case set out the fact as follows:—The plaintiff's house has stood for upwards of twenty years before the nuisance complained of, during all which time there has been free and uninterrupted access of light and air to the windows in question. Prior to the 2d October, 1855, the plaintiff's house, and the land on which the defendant has built, belonged to William Erwood, Jr., and Edwin Carter, who were seised thereof in fee. On that day the said William Erwood, Jr., and Edwin Carter, leased the land on which the defendant has built to George Payne, George Charlesson Arney, and the Rev. Edward Hampson, described in the lease, as in fact they were, as trustees of the Workmen's Stores Industrial Society, for ninety-nine years from the 29th September, 1855, in which lease were contained the following covenants:—"And also that the said George Payne, George Charlesson Arney, and Edward Hampson, their executors, administrators, and assigns, shall, within the space of nine calendar months from the date hereof, build upon the said piece or parcel of ground one good and substantial storehouse, messuage or tenement, and buildings, with the necessary offices and outbuildings, and all proper fixtures and fastenings, the same to be built with good and sufficient materials of every sort and description, and in a workmanlike manner, according to the plan, elevation, and specification this day signed by the said parties hereto, and to the satisfaction of the surveyor of the said William Erwood and Edwin Carter, their heirs and assigns; and also shall not erect or build any other building on the said ground hereby demised other than the said messuage or tenement, storehouse, and buildings mentioned and described in the said last-mentioned plan, without the license and consent in writing of the said William Erwood and Edwin Carter, their heirs or assigns; but it shall be lawful for the said George Paine, George Charlesson Arney, and Edward Hampson, their executors, administrators, and assigns, from time to time during the said term, to make alterations in the said messuage or tenement, storehouse, and buildings, so that the same shall not in any way be diminished in value, and if required shall be made under the superintendence and to the satisfaction of the surveyor

for the time being of the said William Erwood and Edwin Carter, their heirs or assigns." Up to the time at which the said lease was made there had never been, so far as can be traced, any severance either in the title to or possession or occupancy of the said land and house, and the same had been occupied and used together by the proprietor or proprietors thereof for the time being for upwards of fifty years. On the 31st December, 1856, the said William Erwood Jr., and Edwin Carter, being then the owners in fee-simple both of the said house and land, but, as to the land, subject to the said lease, conveyed the said land to the said George Payne, George Charlesson Arney, and the Rev. Edward Hampson, trustees as aforesaid, in fee-simple, and the fee has from that time hitherto been vested in them. On the 6th May, 1857, the said William Erwood, Jr., and Edwin Carter, conveyed the plaintiff's house to James Griffin in fee-simple, under whom the plaintiff had, before the grievances complained of, become, and has since continued to be, and is entitled to the possession of the said house. Subsequent to the said conveyance in fee to the said George Payne and others, trustees as aforesaid, and subsequent to the plaintiff becoming entitled to the said house, the defendant, by the direction or with the authority of the said trustees, who were then and still are possessed of the said land, began to build on the said land so conveyed to the said trustees, and built so as materially to obstruct the light and air coming to the plaintiff's said windows of his said house. He did not build according to the plan mentioned and referred to in the said lease to the said trustees, but built on another and different plan, which was sanctioned by the trustees. Had he built according to the said plan, the light and air coming to the plaintiff's said windows would not have been obstructed to the same extent as they are by the present building, though such light and air would have been obstructed to some extent. The question for the opinion of the court is, whether or not the defendant is liable to the plaintiff for obstructing the light and air coming to his said windows; and if the defendant is so liable, whether he is liable for the whole of the obstruction—that is to say, both for the obstruction of so much of the light and air as would have been obstructed if he had built according to the plan mentioned and referred to in the said lease, and for the excess, or only liable for the excess. If the court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff on the issues joined on the declaration, for such damages as the arbitrator shall find, and costs, and the arbitrator is to assess the damages either for the whole obstruction or the excess only, according to the judgment of the court. If the court shall be of opinion in the negative, judgment is to be entered for the defendant on the issue joined on the second plea, with costs applicable to such issue. The judgment and costs of the other issues to depend

on the result of the reference under the said order. The pleadings and the leases are to be taken as part of the special case. The case was now argued by

Petersdorff, Serjt., for the plaintiff.—In order to put a reasonable construction upon the transaction, it must be supposed that the intention of the parties was, that the right to the light in the house now belonging to the plaintiff should be preserved. The grantee must be taken to be cognizant of the state of the property, and the advantages it enjoyed, and to assent to take his conveyance, subject to their continuance. This view is supported by the case of *Palmer* v. *Fletcher*, 1 Lev. 122. [WILDE B.—But see what TWISDEN J. said in the same case. *Palmer* v. *Flessier*, 1 Keb. 553, 625. MARTIN B.—And HOLT C. J. in the case of *Tenant* v. *Goldwin*, 2 Ld. Raym. 1093.] The authority of that dictum has been doubted. The view which I take is further supported by the cases of *Cox* v. *Matthews*, 1 Vent. 237; *Rosewell* v. *Pryor*, 6 Mod. 116; and *Compton* v. *Richards*, 1 Price, 27. [POLLOCK C. B. — If a man builds a house, and grants it away, it has, as against him, all the rights of an ancient house.] I also rely on the case of *Swansborough* v. *Coventry*, 9 Bing. 305. [WILDE B.—The effect of that case is, that contemporaneous grants are on the same footing as though the house were granted first. MARTIN B. referred to *Pinnington* v. *Garland*, 9 Exch. 1.] As to the lease, I cannot use it otherwise than to show the intention of the parties.

Lush, contra, was not called upon.

POLLOCK C. B. — I think that the plaintiff's counsel has no authority for the proposition which he has attempted to maintain. In construing any conveyance we must collect the meaning from the language which is employed. We cannot found any argument on the lease when the reversion which is reserved by it is gone. We must look to the instrument by which the fee-simple now vested in the defendant is conveyed to him. In this there is no covenant restraining the defendant from building, and no limitation of any kind. Therefore the action will not lie, and the defendant is entitled to our judgment.

MARTIN B.—I find that the words of the conveyance are in the largest and most absolute terms: they contain nothing whatever to limit their operation and effect. The learned counsel for the plaintiff contends that, notwithstanding the conveyance, the defendant is not at liberty to erect a building which obstructs the light to the plaintiff's house. There is no authority for this: the conveyance is perfectly unconditional. Under this state of things, the grantee has against the grantor every right which a man can have —that is to say, the right to use the land in every lawful way.

CHANNELL B.—I am of the same opinion with my Lord and my Brother Martin. The argument in favor of the plaintiff rests on

the case of *Palmer* v. *Fletcher*. But that case is explained by the case in Lord Raymond, where the true view is taken by Lord Holt in these words:—"If, indeed, the builder of the house sells the house, with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." I think that is the true view, and it does not conflict with the independent authorities. But it is said that there was a prior lease, and that the land having been originally assigned under that lease, controls the effect of the subsequent conveyance. But nothing was done under that lease, and I do not think the time at which the conveyance took place affects the view adopted by Lord Holt.

WILDE B.—I am of the same opinion. By the instrument by which the defendant first entered on the premises he was restrained from building, and subsequently, in the year 1856, he obtains a title from the owner of the house. The lease certainly restrains the defendant from building, but as the reversion is parted with, the lease is gone, and all the effect is gone along with it. Then, what is to prevent the defendant, having obtained the fee, from building upon his property? My Brother Martin has said that the conveyance is in general terms; and if the conveyance does not restrict him, what does? It is said that the circumstance of the owner of the land having a house on the neighboring land is a circumstance from which we must imply a restriction against building; but there is no authority for this position; the only case that approaches to an authority is the case from Levinz. But there all that the court held was, that, under such circumstances as existed there, the court may imply the reservation of a way of necessity. The law has gone so far as to say, that if there be no other way, the law will imply one; but that is no authority for a restriction on building. If, then, the defendant had in 1856 a right to build, the grant to the plaintiff cannot affect his right. The defendant's right to build cannot be taken away by a subsequent disposition of property. It may be that, as regards the owner of the land, he cannot derogate from his own grant; but it seems scarcely capable of being expressed in reasonable language that the defendant's right can be crippled and cut down by a subsequent grant to the plaintiff.

Judgment for the defendant.

PARKINS and Wife *v.* SCOTT and Wife.—May 8, 1862.

Slander against wife — Repetition of the slander — Special damage— Husband's refusal to live with wife.

An action by husband and wife for words not uttered in the husband's presence, but repeated to him by the wife, imputing to her a want of chastity, will not lie against the author of the slander, the special damage alleged being the husband's refusal to live with the wife in consequence of the imputation made upon her.[1]

SLANDER.—The words laid in the declaration, as spoken of the female plaintiff by the female defendant, were, "Go in, you nasty slut, and I'll tell you what you are; you have been a whore from your cradle;" innuendo, that she was unchaste, and had been guilty of adultery; and special damage, that the husband of the female plaintiff, in consequence, refused to live with her, per quod consortium amisit. Plea, not guilty. Issue thereon. The action was tried at Leicester, at the Spring Assizes, 1862, before WILLIAMS J., when a verdict was found for the plaintiffs, with 40*s.* damages. At the trial it appeared that the words had been uttered in the presence of several persons, but in the absence of the husband, to whom the wife, upon his return home, related the abusive language used to her by the female defendant and other persons, and the husband in consequence refused to continue to live with her. The learned judge reserved leave to move to enter a verdict for the defendants, or a nonsuit, and directed the jury that they must be satisfied the husband left the wife in consequence of the slanderous words spoken by the defendant, which the jury found in the affirmative.

Hayes Sergt., having on a former day obtained a rule to set the verdict aside, and enter a nonsuit or verdict for the defendants, on the ground that the alleged special damage did not arise from the speaking of the words by the female defendant, but from the voluntary communication by the female plaintiff to her husband of those words and other abusive language; or why the judgment should not be arrested on the ground that the action is not maintainable, the words not being actionable in themselves, and the alleged special damage not being a sufficient legal damage to render the words actionable.

O'Brien and *Cockle* now showed cause.—The jury have found as a fact that the male plaintiff left his wife in consequence of the slanderous words uttered by the female defendant, and therefore it cannot be said that it was partly in consequence of other abusive language used by other persons. The plaintiffs' proposition is, that a married woman may sustain an action for loss of consortium

[1] See Stevens *v.* Hartwell, 11 Met. 542.

arising from slander, such as the defendant here made use of; and this appears to have been the opinion of Lords Campbell and Cranworth in *Lynch* v. *Knight*, 5 Law T. N. S., 291; but the words in that case did not impute adultery, so that the case itself is not in point. It must be admitted also that Lord Wensleydale expressed a contrary opinion, and Lord Brougham expressed doubts on the subject. On principle, it would be expected, that if an unmarried woman can maintain an action for loss of hospitality arising from an imputation of incontinence, a married woman could do so for loss of consortium from an imputation of adultery. Thus, in *Moore* v. *Meagher*, 1 Taunt. 39, it was decided that the loss of the hospitality of friends, arising from the imputation of incontience to an unmarried woman, was a sufficient temporal damage whereon to maintain an action. [BRAMWELL B.—Here the husband acted illegally in leaving his wife.] The authority of *Vicars* v. *Wilcocks*, 8 East. 1, on which that doctrine is founded, is shaken by subsequent cases. The true rule is, that the special damage must be the reasonable and probable consequence of the words spoken. The slander being false, the person who causes the special damage, by acting upon it, will, in the majority of cases, act illegally; but it is not for the slanderer to object that his words have been taken to be true. [BRAMWELL B.—Where a servant is wrongfully dismissed in consequence of words spoken of him not per se slanderous, can the servant recover against the master, and also against the author of the words?] The damages in the two cases are not the same. In the action for slander he might recover for having his lucrative occupation turned to a mere right of action. In *Lumley* v. *Gye*, 22 L. J. Q. B., 463, it was held that an action would lie by a master against one who seduced away his servant, though the servant was also liable to an action. *Wilton* v. *Webster*, 7 Car. & P. 198, is a strong case as to the husband's right to sue for loss of consortium. Where the defamatory words constitute the injuria, and the loss accrues to the wife, it is submitted the present form of action is maintainable. [WILDE B.—Where is there any obligation for the wife to repeat the language here used?] If the husband had been informed of it from any other quarter, her position would have been compromised; she was therefore bound to tell him what had occurred. In *Kendillon* v. *Malby*, Car. & M. 403, the special damage consisted in the dismissal of a constable in consequence of a report, made by the inspector of police in discharge of his duty, of a censure on the constable uttered by a justice of the peace, and the dismissal was held to be the direct consequence of the censure. That case was distinguished from *Ward* v. *Weeks*, 7 Bing. 211, on the ground that the repetition was not a voluntary act. A person cannot be bound to take no notice of a slander affecting his capacity and power of performing his duty. If a partner

was accused of robbing his co-partner, he would be bound to tell him of the imputation; and if special damage ensued, it is submitted he could recover for it in an action for slander.

Hayes Serjt., and *Field*, in support of the rule.—In the first place, the husband left his wife in consequence of slanderous words spoken by others, as well as by the female defendant. [BRAMWELL B.—Is no action maintainable against any of the slanderers, when the words are not per se actionable, if special damage ensues as the result of several slanders? *Wade* v. *Tatton*, 25 L. J., C. P. 240, is an authority in favor of such an action.] The main question here is, whether words not per se actionable can be made so by reason of a supposed duty to repeat them. If such a duty exists, it must be correlative, and the husband must be bound equally to repeat scandal about himself to his wife. The doctrine might be extended to all near relationships, and thus people might create for themselves innumerable rights of action. Moreover, here the husband would in reality get the compensation. The case of *Ward* v. *Weeks*, 7 Bing. 211, is precisely in point. There, as here, the repetition of the slander was a spontaneous and unauthorized act. The special damage cannot be the natural and necessary consequence of a slander, where the will of another person is interposed. Could a tradesman, accused of using false scales, recover as special damage, in an action of slander, the loss of customers to whom he had repeated the accusation? The law regards the action of slander with jealousy; and in *Allsop* v. *Allsop*, 5 H. & Norm. 534; 29 L. J. Ex. 315, it was decided that neither mental suffering nor sickness were special damage which would sustain the action where the words per se were not actionable.

POLLOCK C. B.—I am of opinion that the rule to enter a nonsuit must be made absolute. I cannot help regretting that we should have been called upon to deal with such a matter as has on the present occasion been brought before us. It hardly deserves the name of slander, being mere vulgar abuse and opprobrious language, uttered without any pretence that there was any foundation for it in reality. The jury, however, have found that the husband has left his wife in consequence of this language, and we have to dispose of the case. It appears to me that the case of *Ward* v. *Weeks*, 7 Bing. 211, is an authority in point. That case decides that a person cannot, in an action of slander, be held liable for special damage as the result of his words, unless it arose from the act of a person who heard the words spoken, or to whom he had authorized their communication. Here the defendant neither spoke the words in the presence of the husband, nor authorized the communication of them to him. That case is, therefore, an express authority in point, and the rule for a nonsuit must be made absolute.

MARTIN B.—The case of *Ward* v. *Weeks* is an authority in

point, and must govern our decision in the present case, as the slander was neither uttered in the husband's hearing, nor the repetition of it to him authorized by the defendant. Though, however, we are here bound by that authority, the law on this subject, as laid down in that case, does not, in my judgment, stand on a satisfactory basis. As to the argument that the husband is himself a party to this action and the author of the special damage, the husband is here merely joined for conformity.

BRAMWELL B.—I also think this rule should be made absolute for a nonsuit, and I am not dissatisfied that the law should be as it is laid down in *Ward* v. *Weeks*. That a man should be held responsible for the natural consequences of his own acts is just, and therefore a person is properly liable for the consequences that flow directly from his statements. But if another, without any authority to do so, repeat those statements, knowing what may be their effect, he, and not the orignator of them, is justly responsible for what ensues. It has been argued that the natural result of what had taken place was, that the wife should repeat it to her husband; but to that argument I do not assent; and the case of *Ward* v. *Weeks* being in point, I think our judgment should be for the defendants.

WILDE B.—I adhere with satisfaction to the decision of *Ward* v. *Weeks*, and adopt the rule there laid down. In that case the Court laid down the rule generally, that the special damage must be the act of a person who heard the words spoken, or, at the least, to whom the defendant authorized their repetition; and they do not go on to point out any limitation of this rule which might arise out of a supposed duty to repeat the slander. In my judgment it would be dangerous if any such limitation were admitted. From a limitation arising out of a supposed duty we readily pass to what is natural and likely, and such a test must inevitably make the law on the subject confused and uncertain. In the present case, however, there was, in my judgment, no duty whatever in the wife to repeat all the vile language that had been uttered. The words used were nothing but a missile for low abuse. On these grounds I think the defendant entitled to judgment.

Rule absolute for a nonsuit.

LEE *v.* GRIFFIN.—May 9, 1861.

Goods sold—Work and labor—Statute of Frauds, sect. 17.

A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died. *Held*, a contract for the sale of goods within sect. 17 of the Statute of Frauds, 29 Car. 2, c.

3; and that B. could not sue A.'s executor in an action for work and labor done and materials provided for the testatrix.

Declaration against the defendant, as the executor of one Frances Penson, for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff, as a surgeon-dentist, for the said Frances Penson. Plea, that the said Frances Penson never was indebted as alleged. On the trial, before CROMPTON J., at the Sittings for Middlesex after Michaelmas Term in 1860, it appeared that the action was brought to recover the sum of 21*l.* for two sets of artificial teeth ordered by the deceased. The plaintiff had, in pursuance of an order from the deceased, prepared a model of her mouth, and made two sets of teeth; as soon as they were ready he wrote to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:—

"My dear Sir,—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours, &c.,

"FRANCES PENSON."

Shortly after writing the above letter Miss Penson died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of an acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds. The plaintiff's counsel contended, that, on the authority of *Clay* v. *Yates*, 1 H. & Norm. 71, the plaintiff could recover in the action on the count for work and labor done and materials provided. The learned judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict. In Hilary Term following,

Griffits obtained a rule nisi accordingly; against which,

Patchett now showed cause.—The ratio decidendi in this case is, whether the work and labor is of the essence of the contract, or the materials that are found. The deceased, in truth, contracted for the skill of the dentist, and the materials are merely ancillory to the work and labor. *Clay* v. *Yates*, 1 H. & Norm. 71. [HILL J.—The circumstances in *Clay* v. *Yates* are peculiar. It was a case of a printer employed to print a book. If I employ a man to print for me, I must give him something to print from, and he does his work with my materials; he also, to a certain extent, supplies his own materials, but they are only accessorial. The present case is more like *Towers* v. *Osborne*, 1 Str. 506, and other similar cases, which were decided on the Statute of Frauds, before the passing of Lord

Tenterden's Act, 9 Geo. 4, c. 14.] This case is not to be distinguished from that of an artist employed to paint a picture. In *Clay* v. *Yates*, 1 H. & Norm. 71, MARTIN B. says, "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it worth 10*s*., surely he might recover on a count for work and labor;" and POLLOCK C. B. in his judgment says, "In the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and labor is of the highest description, and the material is of no importance as compared with the labor, the price may be recovered as work and labor and materials." So here, the ivory used in the work was of insignificant value compared to the skill employed. [BLACKBURN J.—*Atkinson* v. *Bell*, 8 B. & Cr. 277, is an express authority against you; though the dictum of BAYLEY J. that a plaintiff cannot maintain an action for work and labor, because the labor was bestowed on his own materials, is not law, and has been dissented from in *Grafton* v. *Armitage*, 2 C. B. 336, and also in *Clay* v. *Yates*, 1 H. & Norm. 71.] If the plaintiff cannot recover on the count for work and labor, he can maintain his action on the count for goods bargained and sold. The letter written by the deceased is a sufficient memorandum of a contract under the 17th section of the Statute of Frauds, 29 Car. 2, c. 3; *Ridgway* v *Wharton*, 6 H. L. C. 238.

Griffits, in support of the rule, was not called upon to argue.

CROMPTON J.—I think that this rule ought to be made absolute.

On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of showing what document is referred to. Assuming, in this case, that the two letters are sufficiently connected, still there would not be any evidence of the contract. The contract in question was, to deliver some particular teeth, to be made in a particular way; but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two cases is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a

case an action might perhaps be brought for work and labor done, and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labor. *Clay* v. *Yates* turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the materials supplied, is a criterion by which to decide whether the contract be one for work and labor, or for the sale of a chattel. Here, however, the subject-matter of the contract was for goods to be supplied. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL J.—I am of the same opinion. I think that the decision in *Clay* v. *Yates* is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. *Atkinson* v. *Bell*, 8 B. & Cr. 277, is, in my opinion, good law, with the exception of the dictum of BAYLEY J., which is repudiated by MAULE J. in *Grafton* v. *Armitage*, 2 C. B. 339, where he says, "In order to sustain a count for work and labor it is not necessary that the work and labor should be performed upon materials that are the property of the plaintiff." And TINDAL C. J. in his judgment in the same case (p. 340), points out that in the application of the observations of BAYLEY J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of *Atkinson* v. *Bell* is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be make for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted: no action can therefore be brought by the plaintiff.

BLACKBURN J.—On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point the question is, whether the contract was one

for the sale of goods, or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor, which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the parchment and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In *Atkinson* v. *Bell*, 8 B. & Cr. 277, the contract, if carried out, would have resulted in the sale of a chattel. In *Grafton* v. *Armitage*, 2 C. B. 336, TINDAL C. J. lays down this very principle. He draws a distinction between the cases of *Atkinson* v. *Bell* and *Grafton* v. *Armitage*. The reason he gives (pp. 340, 341) is, that in the former case "the substance of the contract was goods to be sold and delivered by the one party to the other;" in the latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that decision reconciles those two cases, and the decision of *Clay* v. *Yates*, 1 H. & Norm. 71, is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is, whether the value of the work exceeds that of the materials used in its execution; for if a sculptor was employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Judgment for the defendant.

EDWARDS *v.* SOUTHGATE.—April 16, 1862.

Shipping agent—Lien—Bill of lading.

A shipping agent having a lien on the bill of lading of goods he has shipped may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order to retain his lien on them, and is not liable to any action for so doing.

This was an action by the assignees of one Morris, a bankrupt, against a shipping agent whom he had employed in the shipment of

certain goods. The first count was founded on the duty arising out of the employment; the breach alleged being that the defendant did not hand over to the bankrupt the bill of lading, but wrongfully retained the same, so that the goods could not be delivered according thereto. The second count was in trover. The defendant pleaded to the first count denying the duty, and breach of duty, and also alleging a lien for his charges; and to the second count he pleaded not guilty and not possessed.

The cause was tried before MARTIN B. at the last London Sittings; and it appeared that the defendant, a packer and shipping agent, had been employed by Morris, the bankrupt, to pack and ship eighty-six packages of goods; and was to get the bills of lading in his own name, and endorse them to Morris on receiving his cheque for the amount of his charges. The plaintiff accordingly shipped the eighty-six packages, his charges on which came to a certain sum, which was not paid. He had always said he would not give up the bill of lading until he was paid. The goods were shipped for Odessa; and arrived there, but were never unloaded nor in the possession of the agent of the bankrupt there: the defendant still retaining the bill of lading, and he not being paid, they were at his direction brought back to England. The learned Baron upon this evidence told the jury in effect, that the defendant had done only what was right and reasonable to retain his lien. He was entitled to a verdict, and they on that direction found a verdict accordingly.

M. Smith, *Q.C.* upon the part of the plaintiff, moved for a new trial, on the ground of misdirection. The defendant had no right to alter the destination of the goods. [MARTIN B.—He only did what was necessary to retain his lien.] He only had a lien on the bill of lading. [WILDE B.—During the voyage; but on its completion surely he had also a lien on the goods? or else the lien would be useless.] [POLLOCK C. B.—The holder of a bill of lading as security is in the same position as if he held the goods. For all commercial purposes the bill of lading represents the goods.] The defendant had no right to alter the destination of the goods. [BRAMWELL B.—Why not? What was he to do?] Hold the goods at Odessa. [WILDE B.—Why not here?] Because Odessa was the place of their destination. [BRAMWELL B.—He could not hold them there without having them landed and warehoused; which would have involved an expense he was not bound to incur.] He was if he desires to enforce his lien. [BRAMWELL B.—Is not the real question this: whether it was reasonable for the maintenance of his lien so to deal with them. If it was reasonable to have the goods landed, then he ought to have taken that course; if reasonable to have them brought back, then he was entitled to have them so dealt with.] That was hardly left to the jury.

The COURT (POLLOCK C. B., MARTIN B., BRAMWELL B., and WILDE B.) concurred in thinking that there ought to be no rule.

It was a fallacy to suppose that there was not a lien on the goods, or that a person having a lien could be guilty of a conversion for dealing with the goods in such a way as was right and reasonable in order to retain it. If the goods had not been brought back, they must have been landed and warehoused at Odessa, and then it might as well have been contended that this would be a conversion, because an unauthorized dealing with the goods. There was no conversion therefore. Neither was there any breach of duty. The defendant had no agent at Odessa. The plaintiff was bound to have had one there to receive and pay the charges on the goods. The default was on his part. What the defendant contracted to do, and what his lien was for, was for the shipment of the goods to Odessa; not for receiving them there. He shipped them to Odessa and so earned his money, and had a right to maintain his lien.

Rule refused.

YOUNG *v.* MACRAE.—Nov. 14, 1862.

Libel—Disparagement of goods sold by rival trader.

A circular published by a trader, the effect of which is a mere comparison between an article which he makes or sells and a similar article made or sold by another trader, representing that the other is inferior, but not that it is adulterated or unfairly dealt with, nor conveying any imputation on the conduct or character of the rival trader, is not libellous nor actionable even with special damage.

Quære, whether written slander as to goods is actionable, even with special damage, if it does not amount to slander of title.

LIBEL. — The declaration stated that the plaintiff Young was patentee of a certain paraffin oil, that he had assigned it to the co-plaintiffs, and carried on with them the trade and business of manufacturers and sellers of paraffin oil, and that the defendant had falsely and maliciously published of and concerning the plaintiffs, as such manufacturers and sellers, and of and concerning certain oil which had been imported by the defendants from America, a circular in which was copied a certificate given by one Professor Muspratt in these terms: "I certify that I have carefully tested this oil" (meaning the oil of the defendants) "and that I find it a colorless and aromatic liquid, while Young's," (*i.e.*, the plaintiff's) "is a reddish brown, is much thicker, and has a more disagreeable odor; and further, that in burning the two oils comparatively in the ordinary one shilling lamp I found the power of light produced by the American" (meaning the defendant's oil) "equal to four and a half wax candles, while Young's" (the plaintiff's) "yields a light nearly 25 per cent. less;" thereby meaning that the paraffin oil manufactured and sold by the plaintiffs was inferior in quality to the oil imported by the defendants.

Special damage, that divers persons who would have bought the

oil of the plaintiffs were induced to and did buy the other oil.—Demurrer.

Milward (*Gates* with him), for the defendant in support of the demurrer. — The alleged libel merely amounts to this, that the defendant asserts his oil to be better than the plaintiff's. [COCKBURN C. J. — There is no imputation on their character as traders; as there would be for example, if it had been suggested that they had adulterated their oil. There is a mere comparison between the quality of the two oils, on the authority of a professor, and a representation that the defendant's is the best.] Just so. That is no cause of action.

The court called on

Edward James, Q.C. (*T. Jones* with him), for the plaintiffs.—The words are libellous, coupled with special damage. [BLACKBURN J.—That will not help you unless the words are defamatory.] They are so, published of the plaintiffs as traders, because disparaging to them in that character. [WIGHTMAN J.—Why so? What are they charged with? It is merely stated that their commodity is inferior to the other.] In *Ingram* v. *Lawson*, 6 Bing. N. C. 212, it was held that a letter, suggesting that the plaintiff sent a ship to sea which he knew not to be seaworthy was actionable. [BLACKBURN J. —Because there was a severe imputation on his conduct and character as a trader. Here the imputation is only on the character of the goods. Is there any case where any representations as to goods or property have been held libellous (except in the case of slander of title) even with special damage?] In *Evans* v. *Harlow*, 5 Q. B. 624, there was a case somewhat similar, and though the court there held that the action would not lie, because there was not special damage, it is implied that it might have lain if there had been. [WIGHTMAN J. —That case is against you.] [COCKBURN C. J.—There seems to be no case in favor of the action.] There is none against it. And it is averred that the words were published "falsely and maliciously" —*i.e.*, with wilful falsehood. Surely that, coupled with special damage, makes a cause of action?

COCKBURN C. J.—If one man falsely and maliciously disparages an article manufactured or sold by another, by statements he knows to be false, even although he does not cast any imputation on his personal or professional character, then, if special damage ensues, possibly an action might be maintained against him. But all that appears here is that the defendant, falsely and maliciously, made certain representations in the way of comparison between the plaintiffs' oil and some other oil; and it may be that all that is alleged of the plaintiffs' oil may be true, and that all that is falsely and maliciously alleged may be alleged of the other oil. If this declaration had alleged that the defendant had falsely and maliciously represented the plaintiffs' oil to be of a reddish brown, and emitting

a disagreeable odor, when, in fact, it was not so, then (with special damage) possibly the action might have lain. But here it may well be that the whole falsehood consists, not in the representation of the inferior quality of the plaintiffs' oil, but of the superior quality of the defendant's; not in asserting that the plaintiffs' oil is brown, but that the defendant's is colorless; not that the plaintiffs' has a disagreeable odor, but that the defendant's is aromatic. That is very different, for a trader may lawfully commend his own wares; and if an article which another trader sells is truly represented, and then with a view of gaining an advantage his own commodity is untruly described, there is no cause of action, as there might possibly be if the trader had published what was wilfully false of his rival's commodity. As, therefore, there is no averment here of any false statement as to the plaintiffs' oil, I am of opinion that the action cannot be maintained.

WIGHTMAN J.—I am (although not without doubt) of the same opinion. This seems to me a mere comparison between the one article and the other, with a representation that the plaintiffs' is inferior. And it does not even follow that it is very inferior, merely because it is described as inferior to oil which is very superior. Still less is it implied or represented that the plaintiffs' oil is bad. Moreover, the special damage does not seem to sustain the action, for it is that the customers bought the defendant's oil rather than that they were deterred from buying the plaintiffs'.

BLACKBURN J. also concurred; adding that he thought it would be found that not even written slander as to goods would be actionable, even with special damage, unless it amounted to slander of title.

MELLOR J. concurred. *Judgment for the defendant.*

DIGEST.[1]

INFANTS AND INFANCY.

I. GENERAL RIGHTS AND LIABILITIES OF INFANTS.

1. An infant alien cannot be naturalized on his own petition; but whether he can upon the petition of his parent or guardian, quære. *Le Forestiere Petitioner*, 2 Mass. 419 (1807).

2. The mother of an infant whose father is dead, is not bound to support such child, if the child have sufficient estate for its own support. *Whipple* v. *Dow*, 2 Mass. 415 (1807).

[1] This title is printed from the sheets of the second volume of the Massachusetts Digest.

3. A minor under twenty-one years of age, is not entitled to his own earnings as against his own father. *Benson* v. *Remington*, 2 Mass. 113 (1806).

4. An infant whose father is dead, and whose mother is again married, is entitled to his own earnings in the service of a third person. *Freto* v. *Brown*, 4 Mass. 675 (1808); 14 Pick. 512.

5. A widow made a contract with G. that her minor son should work for G. at a certain sum per week, and that she would board him while he should so work. After this contract was performed by the mother and the son, she brought an action against G. to recover the stipulated wages. *Held*, that she could maintain the action; that the son had consented to the contract, and had his support out of it, and was therefore bound by it; and that G. would not be responsible to him for the same work. *Clapp* v. *Green*, 10 Met. 439 (1845).

6. Infancy is a personal privilege, of which no one can take advantage but the infant himself. WILDE J. in 13 Mass. 239; PARKER C. J., in 15 Mass. 274; SHAW C. J., in 22 Pick. 543.

7. Even a guardian cannot avoid a beneficial contract made by his infant ward. *Oliver* v. *Houdlet*, 13 Mass. 240 (1816).

8. But an infant's executor or administrator can avoid the infant's contract, if he himself could. *Hussey* v. *Jewett*, 9 Mass. 100 (1812); *Martin* v. *Mayo*, 10 Mass. 139 (1813).

9. So sales made by adults to infants, are voidable by the infant, but not by the vendor. *Oliver* v. *Houdlet*, 13 Mass. 237 (1816).

10. A creditor who attaches his debtor's land, which had been conveyed by him while a minor, cannot avoid the deed on the ground of infancy and hold the land against the grantee. *Kendall* v. *Lawrence*, 22 Pick. 540 (1839).

11. An instrument, not under seal, by which an infant assigns a certain amount of the wages to become due him under an existing contract, and appoints the assignee his attorney to receive it to his own use, the consideration of which is a less amount supplied the infant for necessaries, is not void, nor voidable by his creditors. *McCarty* v. *Murray*, 3 Gray, 578 (1855).

12. The marriage of an infant, with the consent of his father, may remove him from the control of his father, and perhaps give him a right, as against his father, to apply all his earnings to the support of his family; but it does not give him a capacity to make binding contracts, beyond other infants, or any political or municipal rights which do not by law belong to minors. PARKER C. J., in *Taunton* v. *Plymouth*, 15 Mass. 204 (1818).

13. If an infant avail himself of his minority to avoid payment for goods sold him on credit, upon his fraudulent representations that he was of full age, the vendor may reclaim them by suit, as never having parted with the property in them. *Badger* v. *Phinney*, 15 Mass. 359 (1819).

14. If an infant sell goods and receive the money for them, he shall not be permitted to recover back the goods without returning the money. PUTNAM J., in *Badger* v. *Phinney*, 15 Mass. 363 (1819).

15. An infant may, for a valuable consideration, indorse a negotiable promissory note or bill of exchange, so as to transfer the property to an indorsee. *Nightingale* v. *Withington*, 15 Mass. 272 (1818).

16. A minor received a promissory note, in payment of his labor for the maker of the note, and for a valuable consideration indorsed the same to a third person, who knew the indorser to be under age; afterwards the father of the minor received the amount of the maker in discharge of the note, both the father and the maker knowing of the indorsement; the indorsee was held entitled to recover the note against the maker. *Nightingale* v. *Withington*, 15 Mass. 271 (1818).

17. An infant heir is bound to assign dower, and may do it by guardian. *Jones* v. *Brewer*, 1 Pick. 314 (1823).

18. At common law, a male infant, of fourteen years and upwards, is capable of disposing of his personal estate by will. *Deane* v. *Littlefield*, 1 Pick. 239 (1822). But see Gen. Sts. c. 92, § 2.

19. A minor over fourteen years of age, having been bound an apprentice by his guardian, unjustifiably left the service of his master, and after the appointment of a new guardian the first one paid the master for necessary expenses

incurred by him on account of the minor. *Held*, that the minor was not liable at law to the first guardian for the money so paid. *Hapgood* v. *Wesson*, 7 Pick. 47 (1828).

20. A minor over eighteen years of age is legally competent to act as clerk of a militia company. *Dewey, Petitioner*, 11 Pick. 265 (1831).

21. A minor son, authorized by his father to go out to service and receive his earnings to his own use, may maintain an action for his wages against his employer, although such authority was not made known to the employer at the time when the minor entered into his service. *Corey* v. *Corey*, 19 Pick. 29 (1837).

22. If, in such case, no express contract be made with the employer, the law will imply a promise by him to the minor, and not to the father. *Corey* v. *Corey*, 19 Pick. 29 (1837).

23. Where mayor and aldermen of Boston laid out a street over the land of minors, without previous notice, and without making an estimate of the amount of damage thereby sustained by the owners, and more than a year elapsed before either of the owners came of age, a writ of certiorari was ordered, on a petition filed by one of the owners at the first term after he came of age, although notice had been given to the tenant in possession to remove the buildings from the land, which he had communicated to the guardian of the minors within a year after the street was laid out. *Stone* v. *Boston*, 2 Met. 220 (1841).

24. A defendant is not estopped from setting up infancy as a defence to a contract, by his fraudulent representations that he was of full age. *Merriam* v. *Cunningham*, 11 Cush. 40 (1853).

25. The age of consent to the solemnization of marriage in this commonwealth, is fourteen in males and twelve in females, and a marriage solemnized between infants of that age respectively, is valid and binding, even without consent of parents or guardian. *Parton* v. *Hervey*, 1 Gray, 119 (1854).

II. Liability on Contracts.

(a) *What Contracts may or may not be avoided.*

26. A minor who is master of a vessel is not liable for beef and provisions supplied his vessel. *A. B.* v. *Fogerty*, 2 Dane Ab. 25 (1799).

27. Infants may avoid all contracts which may be prejudicial to them, but are bound by all reasonable contracts for their maintenance and education, and by all acts which they are obliged by law to do. Parsons C. J., in *Baker* v. *Lovett*, 6 Mass. 80 (1809).

28. Thus, an infant is bound by his bond duly given in a bastardy process, under Rev. Sts. c. 49; it being a contract the law requires. *McCall* v. *Parker*, 13 Met. 372 (1847).

29. An infant may avoid his release of damages for an injury to his person. *Baker* v. *Lovett*, 6 Mass. 78 (1809).

30. But if, upon trial, the jury find such damages to have been satisfied by an adequate compensation, the infant shall recover nominal damages merely. *Baker* v. *Lovett*, 6 Mass. 78 (1809).

31. An infant not having any parent, guardian, or master, is not bound by his contract of enlistment in the United States service, and may be discharged on habeas corpus, by the state authority. *Pownall* v. *Cushing*, 5 Dane Ab. 593 (1814); *Commonwealth* v. *Harrison*, 11 Mass. 63 (1814); *Commonwealth* v. *Cushing*, 11 Mass. 67 (1814); *Commonwealth* v. *Downes*, 24 Pick. 227 (1836).

32. A minor over eighteen years of age is bound by his enlistment into a volunteer company of militia, although without the consent of his parent, master or guardian. *Dewey, Petitioner*, 11 Pick. 265 (1831).

33. The conveyance of land by a minor, for a valuable consideration, is voidable, and not void. *Boston Bank* v. *Chamberlin*, 15 Mass. 220 (1818); *Kendall* v. *Lawrence*, 22 Pick. 540 (1839).

34. Such conveyance, neither avoided nor confirmed by the minor after coming of age, is valid as against an attachment made by one of his creditors after the minor has become of age. *Kendall* v. *Lawrence*, 22 Pick. 540 (1839).

35. An infant when absent from home and not under the care of his parent or guardian, nor supported by him, is liable for necessaries. Otherwise if at home, under the care of and supported by the parent. Parker C. J., in *Angel* v. *M'Lellan*, 16 Mass. 31 (1819).

36. An infant heir, on coming of age, may avoid an award, made under a submission by his guardian, that he shall pay an annuity to the widow in lieu of dower. *Barnaby* v. *Barnaby*, 1 Pick. 221 (1822).

37. An infant is not bound by his contract to labor a specified time for his employer, and if he leaves voluntarily before the time expires, he may nevertheless recover on a quantam meruit for the services performed. *Moses* v. *Stevens*, 2 Pick. 332 (1824); *Vent* v. *Osgood*, 19 Pick. 572 (1837).

38. But it seems that, if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account. *Moses* v. *Stevens*, 2 Pick. 337 (1824). See 10 Met. 579.

39. Where a vessel was chartered by parol to an infant, it was *held*, that the contract of charter was not void, but voidable by the infant. *Thompson* v. *Hamilton*, 12 Pick. 425 (1832).

40. A written agreement not under seal, signed by a minor, his mother, and stepfather, of the one part, and by the defendant, of the other part, recited that the minor had been living with the defendant to learn the trade of a cooper, but that no indenture had been executed, and it stipulated that the minor should go on a whaling voyage, and should "do the duty he ships to perform," and that the defendant should furnish him outfits, and should receive all his earnings on the voyage, and at the end of the voyage the minor should be free from his apprenticeship. *Held*, that so far as the relation of master and apprentice subsisted de facto, by the residence of the minor with the defendant, it was waived and terminated by the written agreement; and that the written agreement did not constitute a contract of apprenticeship; that it was not binding on the minor, and that he could recover his earnings on the voyage to his own use. *Nickerson* v. *Easton*, 12 Pick. 110 (1831).

41. An infant may bind himself by an express contract for necessaries, if the form of the contract is such that the consideration may be inquired into. SHAW C. J. in *Stone* v. *Dennison*, 13 Pick. 7 (1832).

42. Thus, if an infant of the age of fourteen years enters into an agreement to labor until he shall come of age, in consideration of being furnished with his board, clothing, and education, and he is not overreached, and the agreement is not so unreasonable as to raise any suspicion of fraud, and it is sanctioned by his guardian, and is fully performed on both sides he is so far bound by his contract that he cannot maintain a quantum meruit for his services, merely by showing that, in the event which has happened, his services were worth more than the stipulated compensation. *Stone* v. *Dennison*, 13 Pick. 1 (1832).

43. If a minor, after the death of his father, ship himself in a whale ship as a mariner, the contract is voidable by him, and if he desert before the completion of the voyage he may thereupon recover on a quantum meruit for his services. *Vent* v. *Osgood*, 19 Pick. 572 (1837). But see 1 Gray, 460.

44. A negotiable note made by an infant is voidable, and not void; and if he, after coming of age, promise the payee that it shall be paid, the payee may negotiate it, and the holder may maintain an action in his own name against the maker. *Reed* v. *Batchelder*, 1 Met. 559 (1840).

45. An infant husband is liable for debts contracted by his wife before marriage. *Butler* v. *Breck*, 7 Met. 164 (1843).

46. An infant whose estate is assigned under the insolvent law of 1838, cannot revoke a transfer of property previously made by him in payment of his wife's debts contracted before marriage, so as to vest that property in his assignee. *Butler* v. *Breck*, 7 Met. 164 (1843).

47. A negotiable note, given by an infant for necessaries, is not void in the hands of the promisee; and in a suit thereon by the promisee, he may show that it was given, in whole or in part, for necessaries, and may recover thereon as much as the necessaries for which it was given were reasonably worth, and no more. *Earle* v. *Reed*, 10 Met. 387 (1845).

48. An infant is not liable for the expense of repairing his dwelling-house, on a contract made by him therefor, although such repairs were necessary for the prevention of immediate and serious

injury to the house. *Tupper* v. *Cadwell*, 12 Met. 559 (1847).

49. An infant is not liable to pay for grain furnished for horses owned by a firm of which he was a member, though the horses were employed in the usual business of the firm, and though he was emancipated by his father. *Mason* v. *Wright*, 13 Met. 306 (1847).

50. A minor is liable for money paid at his request by the plaintiff to a third person for necessaries furnished him. *Swift* v. *Bennett*, 10 Cush. 436 (1852).

51. The books of account and testimony of such third person are admissible to prove the character of the article furnished to the minor. *Swift* v. *Bennett*, 10 Cush. 436 (1852).

52. It is a question of law for the court, whether certain articles for which an infant is sued, are within the class of necessaries; and if so, the jury are to pass upon the adaptation of the particular articles furnished to the condition and wants of the infant. *Merriam* v. *Cunningham*, 11 Cush. 40 (1853); *Swift* v. *Bennett*, 10 Cush. 436 (1852); *Davis* v. *Caldwell*, 12 Cush. 512 (1853).

53. The board of four horses for six months, the principal use of which was in the business of a hackman, is not within the class of necessaries for which an infant is liable, although the horses are occasionally used to carry his family out to ride. *Merriam* v. *Cunningham*, 11 Cush. 40 (1853).

54. An infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was *held*, that he could not rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and any other money expended for him by the other party in pursuance of the agreement. *Breed* v. *Judd*, 1 Gray, 456 (1854).

55. An infant who receives property under a contract of sale to him, and then surrenders it to the seller, intending to give up all his interest in it, cannot afterwards avoid such surrender, and retake the property from the possession of the seller. *Edgerton* v. *Wolf*, 6 Gray, 453 (1856).

(*b*) *Avoidance and Ratification of Contracts.*

56. If a minor make a deed, and after he becomes of age, acknowledge it, it binds him and his heirs. *Tenny* v. *Sawyer*, 2 Dane Ab. 17 (1781); 4 Dane Ab. 350.

57. An assignment by an infant of a note not negotiable, may be avoided by him, by giving notice to the assignee that he considers the bargain void, and offering to return the consideration received. *Willis* v. *Twambley*, 13 Mass. 204 (1816).

58. And if after such avoidance the maker of the note settles with the infant, he is not liable to an innocent purchaser of the note from such assignee. *Willis* v. *Twambley*, 13 Mass. 204 (1816).

59. A clause in a will directing the payment of all "just debts" of the testator is not a recognition or promise of payment of a note given by the testator for a valuable consideration, but not for necessaries, so as to prevent the executor from taking advantage of the testator's infancy. *Smith* v. *Mayo*, 9 Mass. 62 (1812). And see 10 Mass. 137; 11 Mass. 147.

60. An infant contracted a debt, and after coming of age, said to a third person, "I owe you and M. [the plaintiff], and when I return from this voyage I will pay you both;" and at another time said to the plaintiff, on his requesting payment, that he had not then the money, but that when he should return from the voyage on which he was about sailing, he would settle with the plaintiff. The debtor died at sea, while performing the voyage above alluded to; and there was no evidence of any other dealings between the parties. *Held*, that there was a ratification, and that the executor of the debtor was liable; the words "when I return from the voyage" being considered, not as a condition precedent, but only as postponing the time of payment. *Martin* v. *Mayo*, 10 Mass. 137 (1813). But see 4 Pick. 50.

61. Where a minor received money of the plaintiff, and made a promise in writing to pay the same to the plaintiff's daughter, and, on his coming of age, being applied to by the daughter's hus-

band, said it was not then convenient to pay it, but that on his arrival at the plaintiff's residence, whither he was then bound, he should pay him the money due him, it was *held*, that no action lay for the plaintiff upon an express promise, but that on this evidence a general indebitatus assumpsit for money received to the plaintiff's use would lie, the evidence being sufficient to revive the debt, and to establish the consideration on which the law would imply a promise. *Jackson* v. *Mayo*, 11 Mass. 147 (1814).

62. Where a person, on being applied to for payment of a note made by him during infancy, acknowledged that the money was due, and promised that on his return to his home, he would endeavor to procure it and send it to his creditor, it was *held* to be a sufficient ratification of the original promise. *Whitney* v. *Dutch*, 14 Mass. 457 (1817).

63. Where an adult and an infant were co-partners, and the former made a note in the name of the firm for a partnership debt, and the infant, after coming of age, ratified it, he was held to pay it. *Whitney* v. *Dutch*, 14 Mass. 457 (1817).

64. If an infant mortgage his land, and after he comes of age, convey the same land "subject to the mortgage," he thereby confirms the mortgage which was before voidable. *Boston Bank* v. *Chamberlin*, 15 Mass. 220 (1818).

65. Partial payment, after arriving at full age, of a debt contracted during minority, is not itself sufficient ratification to render the debtor liable for the balance. PUTNAM J. in *Ford* v. *Phillips*, 1 Pick. 203 (1822).

66. If a minor, while such, makes a partial payment on his promissory note, and after he comes of age, makes an oral promise to pay the balance, he thereby ratifies his former payment, so as to take the note out of the statute of limitations. *Peirce* v. *Tobey*, 5 Met. 168 (1842).

67. Where a defendant, in conversation concerning a note made by him during infancy, said he owed the plaintiff, but was unable to pay him, and that he would endeavor to procure his brother to be bound with him, it was *held* not to be a ratification. *Ford* v. *Phillips*, 1 Pick. 202 (1822).

68. Where an award, under a submission by an infant's guardian, directed that the infant should pay to his mother an annuity in lieu of dower, and that she should release her right of dower, and, after coming of age, he enclosed money to her in a letter, saying, "You will find enclosed the sum of —— in part towards your right of dower; the remainder I shall forward you in a few days; it was entirely unexpected to me that it was not paid before, as I had lodged property in ——'s hands to meet an annual payment;" it was *held* to be a ratification. *Barnaby* v. *Barnaby*, 1 Pick. 221 (1822).

69. So his accepting the estate free of dower, and entering into and enjoying it for several years according to the award, was held to be, of itself, a sufficient ratification. *Barnaby* v. *Barnaby*, 1 Pick. 221 (1822).

70. A ratification, to be valid, must be made with a knowledge that the party is not liable by law. PUTNAM J. in *Ford* v. *Phillips*, 1 Pick. 203 (1822).

71. It must be voluntary, and not under the terror of an arrest. PUTNAM J. in *Ford* v. *Phillips*, 1 Pick. 202 (1822).

72. And must be made before the commencement of the action by issuing the writ. *Ford* v. *Phillips*, 1 Pick. 202 (1822).

73. When the defendant said to the officer having the writ, that his "brother ought to have paid the note; the writ should not go to court, it should be settled; he would see his brother, who ought to pay it;" this was held not to be a ratification. *Tappan* v. *Abbott*, 1 Pick. 203 (1822).

74. A mere acknowledgment of the existence of a debt is not a sufficient ratification of a contract made while an infant; if words merely are relied upon, they must amount to a direct promise to pay the debt. *Thompson* v. *Lay*, 4 Pick. 48 (1826). And see 9 Mass. 64; 10 Mass. 149; 14 Mass. 460; 1 Pick. 203 and 223; 13 Met 310.

75. An express confirmation, such as "I do ratify and confirm the debt," would be sufficient, although no words of direct promise are used. PARKER C. J. in *Thompson* v. *Lay*, 4 Pick. 49 (1826).

76. If the evidence of ratification is of a promise to pay "when the defend-

ant should be able," the plaintiff must prove the defendant's ability; but he is not bound to show an ability to pay without inconvenience. *Thompson* v. *Lay*, 4 Pick. 48 (1826).

77. If an infant buys goods on credit, and retains them in his own hands, and uses them for his own purposes, for an unreasonable time after he comes of age, without restoring them to the seller, or giving him notice of an intention to avoid the contract, it operates as a ratification of the contract, and renders the buyer liable in an action for the price of the goods. *Boyden* v. *Boyden*, 9 Met. 519 (1845).

78. An infant bought goods, not necessaries, and the vendor, before he came of age, brought an action for the price and attached the goods, and they remained in the hands of the officer at the time of the trial. The defendant gave no notice, after he became of age, of his intention not to be bound by the contract of sale. *Held*, that there was not a ratification of the purchase, and that the action could not be maintained. *Smith* v. *Kelley*, 13 Met. 309 (1847).

79. B., a minor, and S., a person of full age, entered into a partnership, to the capital stock of which B. contributed about $900, and which was dissolved by mutual consent, before B. became of age. On the dissolution it was ascertained that the firm had made about $300, and B. sold and conveyed to S. all his interest in the partnership property, for which he received the note of S. for $1100, secured by a mortgage of personal property, and S. at the same time gave B. an obligation to pay the debts of the firm. After coming of age, B. proved his note against the estate of S., who had taken the benefit of the insolvent law, and also instituted proceedings with a view to enforce his claim under the mortgage. *Held*, that by these proceedings B. had not ratified the partnership, and made himself liable for the partnership debts. *Dana* v. *Stearns*, 3 Cush. 372 (1849).

III. Liability for Torts and Crimes.

80. An infant is liable in trespass for having procured another to commit an assault and battery. *Sikes* v. *Johnson*, 16 Mass. 389 (1820). And see 6 Mass. 78.

81. An infant under fourteen years may be indicted for an assault with intent to commit a rape. *Commonwealth* v. *Green*, 2 Pick. 380 (1824).

82. An infant, who hires a horse to go to a certain place, but goes to another place in a different direction, is liable in trover for an unlawful conversion of the horse. *Homer* v. *Thwing*, 3 Pick. 492 (1826).

83. An infant, prevailing on the plea of infancy, in an action on a promissory note given by him for a chattel which he had obtained by fraud and refused to deliver on demand, is still liable to an action of tort for the conversion of the chattel, although he had sold it before the demand was made upon him. *Walker* v. *Davis*, 1 Gray, 506 (1854).

IV. Actions by and against Infants.

84. The plaintiff in an action against a minor should see that a guardian ad litem is appointed for the defendant, or judgment against him is erroneous. *Knapp* v. *Crosby*, 1 Mass. 479 (1805); 5 Gray 399; 14 Gray, 179.

85. In an action on a judgment recovered in another state, without actual notice to the defendant of the original suit, he was permitted to show in defence, that he was a minor when the judgment was recovered, and had no guardian appointed for him. *Bartlet* v. *Knight*, 1 Mass. 401 (1805).

86. That an infant who sues by next friend, had a mother living, is no cause for abating the writ; and if any objection, it must be made by a motion to stay proceedings. *Trask* v. *Stone*, 7 Mass. 241 (1810).

87. The express adoption by an infant, on coming of age, of a contract previously made by him, will make it valid from its date; and an action need not be brought upon the new promise. *Whitney* v. *Dutch*, 14 Mass. 461 (1817).

88. In an action by an infant, brought by his next friend, the latter is "the plaintiff" within St. 1784, c. 28, § 11, requiring original writs to be indorsed by the plaintiff or one of them. *Crosseen* v. *Dryer*, 17 Mass. 222 (1821).

89. An infant plaintiff is liable to costs by force of St. 1784, c. 28, § 9. *Smith* v. *Floyd*, 1 Pick. 275 (1822). And his

prochein ami, as such, is not. *Crandall* v. *Slaid*, 11 Met. 288 (1846).

90. In an action on a joint contract, where one defendant pleads infancy, the plaintiff may enter a nolle prosequi as to him, and proceed against the other defendant. *A. B.* v. *Fogerty*, 2 Dane Ab. 25 (1799); *Tappan* v. *Abbott*, 1 Pick. 502 (1819); *Woodward* v. *Newhall*, 1 Pick. 500 (1823).

91. The power of a next friend commences with the suit, and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless the defendant has waived the necessity of a demand. *Miles* v. *Boyden*, 3 Pick. 213 (1825).

92. The next friend and guardian will be admitted by the court without any other record than a recital in the count. PUTNAM J. in *Miles* v. *Boyden*, 3 Pick. 219 (1825).

93. If a suit is brought by a minor, without the intervention of a guardian or next friend, his infancy may be pleaded in abatement. *Blood* v. *Harrington*, 8 Pick. 552 (1829).

94. But the name of a next friend may be admitted by the court, by way of amendment. *Blood* v. *Harrington*, 8 Pick. 552 (1829).

95. Goods being replevied by a minor, it was objected by the defendant, in arrest of judgment, that the infant was principal in the replevin bond, and so that it was not a sufficient bond. But judgment was given for the plaintiff notwithstanding the objection. *Blood* v. *Harrington*, 8 Pick. 552 (1829).

96. A minor who is tenant in common with another of personal property, cannot maintain trespass (if he can any action) against one to whom the goods are assigned by the other owner, although he disaffirms the sale upon coming of full age. *Furlong* v. *Bartlett*, 21 Pick. 401 (1838).

97. A judgment against an infant, for whom no guardian ad litem has been appointed, on a scire facias upon a judgment charging him as trustee on foreign attachment, is erroneous, and may be reversed by writ of error, without first obtaining a reversal of the original judgment. *Crockett* v. *Drew*, 5 Gray, 399 (1855).

Notices of New Books.

UNITED STATES DIGEST; containing a Digest of Decisions of the Courts of Common Law, Equity and Admiralty, in the United States and in England. By H. FARNHAM SMITH. Vol. XIV. Annual Digest for 1860. Boston: Little, Brown and Company. 1862. Royal 8vo. pp. 1151.

"If you are troubled with a Pride of Accuracy," says Stevens, "and would have it completely taken out of you, print a Catalogue." We should say, print a *Digest*. This beautifully printed royal octavo of eleven hundred and fifty-one pages contains a digest of seventy-nine volumes of Reports. And considering the varied character of the volumes digested, Mr. Smith has achieved his task with a singular degree of success; but many of the titles might have been considerably condensed and the utility of the book proportionably increased. We think that he must have been perplexed and annoyed in writing the title Pleading. Lord Chief Baron Comyns himself, if he had had the decisions occasioned by the absurdities of some of the States, called "codes," to digest, would have abandoned his favorite title Pleader in unmitigated disgust.

The first volume of the United States

Digest is immeasurably superior to all the other volumes, some of which are nearly worthless. With the exception of the titles, Agreement, Boundaries, Constable, and Covenant, it was written by Judge Metcalf; and if he had never written another page of law, this volume would remain an enduring monument of his immense learning.

THE BOOK-HUNTER etc. By JOHN HILL BURTON. With Additional Notes by RICHARD GRANT WHITE. New York: Sheldon and Company. Crown 8vo. 1863. pp. 411.

We read the elegantly printed Edinburgh edition of this book soon after it was published in 1862, and printed occasional extracts in this Journal. We have read the sheets of this edition as it was passing through the Riverside Press. Its typographical excellence places it among the best that have issued from that press. The admirable notes of Mr. White are such as might be expected from the pen of that accomplished scholar. Mr. Burton and Mr. White are both members of the legal profession; and to that profession we conscientiously commend this entertaining and instructive volume. We print an extract from Mr. White's note on p. 107: "General Butler's orders and official correspondence at New Orleans, for hitting the nail square upon the head, and clinching it with a twist of humor, have not been surpassed by any writing of their kind. By reading them, the man weary with the weight of the grand style or fretted with the flippancy of the familiar may obtain real mental refreshment. At the same time he cannot but admire the sagacity which contrived the measures which they announced, and the true benevolence of their purpose."

The Index was prepared for this edition by F. F. Heard, Esq. "So essential did I consider an Index to be to every book," said Lord Campbell in the preface to the third volume of the second edition of the Lives of the Chief Justices, "that I proposed to bring a bill into Parliament to deprive an author who publishes a book without an Index of the privilege of copyright; and, moreover, to subject him, for his offence, to a pecuniary penalty."

A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW: With Notes. By JOHN WILLIAM SMITH. The Third and Fourth Editions by JAMES SHAW WILLES and HENRY SINGER KEATING, Judges of Her Majesty's Court of Common Pleas. The Fifth Edition by FREDERIC PHILIP MAUDE and THOMAS EDWARD CHITTY. London: William Maxwell. 1862. Two vols. Royal 8vo. Vol. I. pp. 903. Vol. II. pp. 784.

This beautifully printed edition of this standard work is far superior to the former editions. Many and valuable additions have been made to the Notes. The Indexes have been rewritten and greatly enlarged, and the Index to the Text has been blended with that to the Notes. In the second and third editions the paging of the former edition was preserved. This mode of paging was inconvenient and perplexing. The fourth and present editions are paged in the ordinary manner. Whoever has had occasion to use the American editions will heartily appreciate these improvements. This edition is dedicated to Lord Wensleydale.

THE MILITARY LAWS OF THE UNITED STATES, relating to the Army, Volunteers, Militia, and to Bounty Lands and Pensions, from the foundation of the Government to the year 1863. To which are prefixed the Constitution

of the United States (with an Index thereto,) and a Synopsis of the Military Legislation of Congress. Philadelphia: George W. Childs. 1863. 8vo. pp. 607.

The edition of the Military Laws, compiled in 1858 by Mr. J. F. Callan, Clerk to the United States Senate's Military Committee, is entirely out of print; and so many material changes have been made therein, and so many important acts have recently been passed, that there was a pressing necessity for its reissue in a corrected form. At the suggestion of many officers of the army, and of the several heads of the Military Bureaux and others, the publisher has issued a second edition of that work, embracing all the Congressional legislation in regard to the Army, Volunteers and Militia, to the end of the last session of Congress, and exhibiting all the Military Laws, including those relating to Bounties, Pensions, &c., enacted since the formation of the government. These laws, chronologically arranged, are all inserted in full, distinguishing by a different sized type those in force from those which have been repealed or are obsolete—with ample notes and references, and the legal decisions in all the cases where they have been given — forming a complete history of the military legislation of the country.

Mr. Callan's great experience in military affairs, eminently qualified him for this task, and the avidity with which his former publication was sought for, justifies the anticipation that this revised, enlarged and greatly improved edition will be received with equal favor.

Hotch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — Littleton, § 267, 176 a.

We print the leading case of *Peter* v. *Compton* from the English edition, 1862, of Smith's Leading Cases. The Note has been rewritten with additions and alterations.

We print title Infants and Infancy from the second volume of the Massachusetts Digest.

We have received A Manual of Pensions, Bounty and Pay. By George W. Raff. 1 vol. 12mo. pp. 477. Published by Robert Clarke & Co., Cincinnati, Ohio. 1862. Also, A Review of the Opinion of the Supreme Court of Illinois, in the case of *The Chicago, Burlington and Quincy Railroad Company* v. *Hazard*, 26 Illinois, 373. By Emery A. Storrs. Pamphlet. pp. 152. 1862.

In our issue of October last we printed an account of the library of *Chancellor* Kent, from the Edinburgh edition of the Book Hunter, which was copied from Dr. Wynne's volume, The Private Libraries of New York. Our friend, Mr. Richard Grant White of New York, corrects the error in a note to the American edition of the Book Hunter, p. 192. "The library in question," says that gen-

tleman, "was that of the late Judge Kent, the son of Chancellor Kent. The library of the son naturally included that of the father. The description of Judge Kent's library bears unmistakable marks of his own hand. The passage in which it is remarked as to the prison and scaffold literature that 'the Chancellor is not responsible for this part of the library, which owes its completeness to the morbid taste of his successor,' is one which Dr. Wynne is too courteous and good-natured to have written; but the sly humor of writing it about himself is perfectly in Judge Kent's manner."

Attention is called to the advertisement of Messrs. Lee & Shepherd. Their stock comprises many valuable works, which they are selling at very low prices.

An inquirer is informed that copies of Jackson on Real Actions can still be had. Messrs. Little, Brown & Co. have a very few.

Separation between class and class is the great curse of British society; for which we are all more or less, in our respective spheres, responsible. It is more complete in manufacturing than in agricultural districts. . . . But I am afraid we all of us keep too much aloof from those beneath us; and this encourages them to look upon us with suspicion and dislike. . . . The great want of English society is the mingling of class with class; the want of sympathy. TALFOURD. *Charge to the Grand Jury at Stafford* at the moment of his death. 13th March, 1854.

Professor Parsons, in his new work on Notes and Bills, vol. ii. p. 1, cites "an odd use of the word" indorsement, from Milton's Paradise Regained, Book III. line 329.

"Chariots, or elephants indorsed with towers of archers."

Johnson, in his Dictionary, ad verb, Endorsement, cites this passage, and gives the meaning of the word, "To cover on the back," and adds, "This is not used."

Little, Brown & Co. will shortly publish: — Story on Bailments, seventh edition, revised, corrected and enlarged. By E. H. Bennett.; Quincy's Reports of Cases Argued and Determined in the Superior Court of Judicature, in the Province of Massachusetts, from 1762 to 1771. 1 vol. 8vo.; Vol. 9 of Gray's Reports; and Vol. 4 of Allen's.

Messrs. Little, Brown & Co. have the new edition of Brunet's Manuel Du Libraire now being published in Paris, by Mm. Firmin Didot Freres. It is to be completed in twelve parts. Volumes one and two and the first part of volume five are now ready. This work of the celebrated French bibliographer contains a mass of information relative to continental writers on jurisprudence which is accessible to the profession in this country in no other form.

In *Kuchler* v. *The People*, 1 Am. Law Reg. N. S. 43, before the passage of the act of 1860, the plaintiff in error committed murder by poisoning his wife. He was indicted, and after that act went into effect, was tried and convicted, and sentenced to be imprisoned and executed, pursuant to its provisions. It was settled in *Hartung* v. *The People*, 22 N. Y. R. 95, that the provisions of the act under which judgment was pronounced on the plaintiff in error, in so far as they apply to crimes committed before that law became operative, are ex post facto, and therefore unconstitutional and void. This determined that the judgment in *Kuchler's case* was erroneous, and must be reversed. The question then arose, what disposition should be made of the

case, upon the reversal of the judgment. And the court decided that the prisoner must be discharged. The following is the concluding passage in the able opinion of Davis J.: "To discharge the prisoner, so justly convicted of his appalling crime, is a most painful duty; the law leaves us no alternative. If the result in his case, and in the parallel one of Mrs. Hartung (in one of which a faithful wife, in the other a confiding husband, were deliberately poisoned to death to give scope to the embraces of a paramour and prostitute), shall form beacons to warn against future imitation of the folly and stupidity of the act of 1860, they will not be wholly without benefit to the community."

There is a natural standing court within us, examining, acquitting, and condemning at the tribunal of ourselves; wherein iniquities have their natural thetas [1] and no nocent [2] is absolved by the verdict of himself. And although our transgressions shall be tried at the last bar, the process need not be long: for the Judge of all knoweth all, and every man will nakedly know himself; and when so few are like to plead not guilty, the assize must soon have an end.—Sir THOMAS BROWNE.

[1] A theta inscribed upon the judge's tessara or ballot was a mark for death or capital condemnation.

[2] . . . . . Se
Judice nemo nocens absolvitur.—JUV.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1862.	Returned by
Allen, Jacob O. (1)	Harvard,	November 17,	Henry Chapin.
Ammidown, Andrew F. (2)	Southbridge,	October 15,	Henry Chapin.
Ammidown, Luther S. (2)	Southbridge,	" 15,	Henry Chapin.
Balcom, Lyman H.	Bolton,	" 10,	Henry Chapin.
Baldwin, George E. (1)	Harvard,	November 17,	Henry Chapin.
Butters, Francis, Jr. (3)	Haverhill,	" 10,	George F. Choate.
Butters, Silas (3)	Haverhill,	" 10,	George F. Choate.
Donelly, Anthony	Royalston,	" 29,	Henry Chapin.
Felton, Horace	Boston,	October 14,	Isaac Ames.
Flint, Benjamin K. (4)	Cambridge,	November 25,	William A. Richardson.
Flint, Samuel (4)	Cambridge,	" 25,	William A. Richardson.
Freeman, Benjamin S. (5)	Attleboro',	September 10,	Edmund H. Bennett.
Freeman, Joseph J. (5)	Attleboro,'	" 10,	Edmund H. Bennett.
Glynn, Henry	Roxbury,	November 3,	George White.
Heywood Chair Company,	Gardiner,	" 11,	Henry Chapin.
Howe, Solon C.	Paxton,	" 12,	Henry Chapin.
Kendall, Moses	Hubbardston,	October 15,	Henry Chapin.
Kirby, Tyler C. (6)	Worcester,	" 6,	Henry Chapin.
Litchfield, Caleb S. (7)	Scituate,	" 14,	Isaac Ames.
Osborn, Franklin A.	Fitchburg,	November 11,	Henry Chapin.
Richardson, Jonathan (6)	Worcester,	October 6,	Henry Chapin.
Sheplie, De Lana	Boston,	November 13,	Isaac Ames.
Smith, William P.	Fitchburg,	" 20,	Henry Chapin.
Snow, Ebenezer (7)	Boston,	" 14,	Isaac Ames.
Stowe, Luther	Worcester,	October 17,	Henry Chapin.
Turner, Calvin K.	New Bedford,	August 15,	Edmund H. Bennett.
Vinson, John	Roxbury,	November 3,	George White.
Walton, Edward H.	South Reading,	" 5,	William A. Richardson.

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